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 Attorneys for Plaintiff/Counterdefendant

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

COUNT'S KUSTOMS, LLC, a Nevada
 corporation,
 Plaintiff,

vs.

JOSEPH FRONTIERA, an individual, and
 RANDSTAD PROFESSIONALS US, LP a
 Delaware Corporation dba RANDSTAD
 PROFESSIONALS, DOES I-X and DOE
 CORPORATIONS XI – XX, inclusive,

RANDSTAD PROFESSIONALS US, LP,
 Counterclaimant,

vs.

COUNT'S KUSTOMS, LLC,
 Counterdefendant.

RANDSTAD PROFESSIONALS US, LP,
 Cross-Claimant,

vs.

JOSEPH FRONTIERA,
 Cross-Defendant.

Case No.: 2:16-cv-00910-JAD-GWF

JOINT STATUS
REPORT

1 **TO: THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA;**

2 Pursuant to this Court's Minute Order [Doc 6], Plaintiff/Counterdefendant, Count's
3 Kustoms, LLC, ("Plaintiff" or "CK"), Defendant/Counter-Claimant, Randstad Professionals US,
4 LP ("Randstad") and Defendant/Cross-Defendant, Joseph Frontiera ("Frontiera"), hereby submit
5 their joint status report as follows:

6 **1. Set forth the status of this action, including a list of any pending motions and/or**
7 **matters which require the attention of this Court.**

8 **a. Removal and Consents**

9 Defendant Randstad filed a Notice of Removal to Federal Court on April 22,
10 2016 (Doc 1). Defendant Randstad filed a (second) Notice of Removal to
11 Federal Court on April 22, 2016 (Doc 4). On April 27, 2016, Defendant
12 Randstad filed an Amended Notice of Removal (Doc 11);

13 **b. Removal Statement**

14 Defendant Randstad filed a Statement of Removal on May 10, 2016 (Doc 19);

15 **c. Pending Motions**

16 Plaintiff filed a Motion to Strike Counterclaim or in the Alternative, Motion to
17 Dismiss on May 2, 2106 (Doc 15), to which Defendant Randstad filed a
18 Response in Opposition on May 19, 2016 (Doc 27);

19 On May 10, 2016, Defendant Frontiera filed a Motion to Dismiss Complaint
20 (Doc 18); and

21 Plaintiff filed a Motion to Strike Defendant Frontiera's Motion to Dismiss as
22 Untimely on May 13, 2016 (Doc 25).

23 **2. Associated Cases**

24 None.

25 **3. Include a statement by counsel of actions required to be taken by the Court.**

26 Decisions on pending Defendant Frontiera's Motion to Dismiss Complaint (Doc 18),
27 pending Plaintiff's Motion to Strike Defendant Randstad's Counterclaim or in the Alternative,
28

1 Motion to Dismiss on May 2, 2106 (Doc 15), to which Defendant Randstad filed a Response in
2 Opposition (Doc 27), and pending Plaintiff's Motion to Strike Defendant Frontiera's Motion to
3 Dismiss as Untimely on May 13, 2016 (Doc 25).

4 **4. Include as attachments copies of any pending motions, responses and replies**
5 **thereto and/or any other matter requiring the Court's attention not previously**
6 **attached to the Notice of Removal.**

7 See Plaintiff's Motion to Strike Counterclaim or in the Alternative, Motion to Dismiss on
8 May 2, 2106 (Doc 15) attached hereto as Exhibit 1;

9 Defendant Frontiera filed a Motion to Dismiss Complaint (Doc 18) attached hereto as
10 Exhibit 2;

11 Plaintiff's Motion to Strike Defendant Frontiera's Motion to Dismiss as Untimely on
12 May 13, 2016 (Doc 25) attached hereto as Exhibit 3;

13 Plaintiff's Opposition to Defendant Joseph Frontiera's Motion to Dismiss (Doc 26)
14 attached hereto as Exhibit 4; and

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Defendant Randstad's Opposition to Plaintiff's Motion to Strike Counterclaim (Doc 27)
attached hereto as Exhibit 5.

DATED this 25th day of May, 2016.

DATED this 25th day of May, 2016.

BLACK & LOBELLO

SEYFARTH SHAW LLP

/s/ Steven Mack, Esq.
STEVEN MACK, ESQ. (NBN 4000)
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Attorneys for Plaintiff

/s/ Amy Abeloff, Esq.
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Los Angeles, California 90067-3021
Attorneys for Defendant
Randstad Professionals US, LP dba Randstad
Professionals

DATED this 25th day of May, 2016.

/s/ Theresa Mains, Esq.
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theresa@theresamainspa.com
Attorneys for Defendant
Joseph Frontiera

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EXHIBIT “1”

EXHIBIT “1”

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UNITED STATES DISTRICT COURT
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vs.

JOSEPH FRONTIERA,
 Cross-Defendant.

Case No.: 2:16-CV-00910-JAD-GWF

**PLAINTIFF/COUNTERDEFENDANT'S
 MOTION TO STRIKE COUNTERCLAIM
 OR IN THE ALTERNATIVE, MOTION
 TO DISMISS**


**PLAINTIFF/COUNTERDEFENDANT'S MOTION TO STRIKE
COUNTERCLAIM OR IN THE ALTERNATIVE, MOTION TO DISMISS**

Plaintiff/Counter-Defendant, COUNT'S KUSTOMS, LLC, ("Plaintiff" or "CK"), by and through its attorney of record Steven Mack, Esq., of the law firm of Black & LoBello, hereby files this Motion to Strike Counterclaim, or in the alternative, Motion to Dismiss ("Motion").

This Motion is made and based on the attached Memorandum of Points and Authorities, the Exhibit attached hereto, the papers and pleadings on file herein, LR 81-1 as this is a removed action and the refile of a previously filed motion in state court, and any oral argument this Court may allow.

DATED this 3rd day of May 2016.

BLACK & LOBELLO


STEVEN MACK, ESQ.
Nevada Bar No. 4000
10777 W. Twain Ave., Third Floor
Las Vegas, Nevada 89135
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is an action that exists as a result of Randstad's failure to perform basic vetting of a candidate that was provided to the Plaintiff, and that person, Frontiera, committed multiple improper and illegal acts causing substantial damages to Plaintiff.

A complaint was filed on March 22, 2016 and served upon Defendant Randstad on March 28, 2016. Randstad filed an answer, counterclaim and cross claim on April 18, 2016.

The counterclaims filed by Randstad are simply affirmative defenses and should be stricken, dismissed or treated as affirmative defenses, such that the answer is either reformed or refiled.

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II. ARGUMENT

Pursuant to FRCP 8(c)(2) Affirmative Defenses:

(c) Affirmative Defenses.

(2) Mistaken Designation. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, **and may impose terms for doing so.** (emphasis added)

In this case, all of the claims in the counterclaim filed by Randstad are simply affirmative defenses. The only damages sought by Randstad in its counterclaims is for attorney fees. Unless awarded as special damages under very limited circumstances not applicable here, attorney fees are, by nature, only allowed by Statute, rule or contract.¹ Further, the award of attorney's fees are governed by NRS 18.010, and are sought after the conclusion of the matter on the merits, not as an element of damages. This being a case of diversity, NRS 18.010 will apply, and as a result, Nevada Supreme Court case law is relevant.

The Nevada Supreme Court has stated, “[w]e have consistently held that attorney's fees are only available when authorized by a “rule, statute, or contract.” Within the stated criteria, the decision to award attorney's fees is left to the sound discretion of the district court. However, a district court may abuse its discretion when it clearly disregards guiding legal principles. Although the counterclaim appears to be a recitation of NRS 18.010(2)(b), the district court specifically awarded attorney's fees as damages under [Defendant's] counterclaim. Hence, the award was not made pursuant to a “rule, statute or contract,” and constitutes an abuse of discretion. In the absence of a contract or rule, a prevailing defendant/counterclaimant may only recover attorney's fees when the requirements of NRS 18.010(2)(b) are met. To allow attorney's fees as an element of damages from an ostensible common-law cause of action we have not yet embraced would swallow the purposes for the attorney's fees statute.”²

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¹ See, *Ace Truck v. Kahn*, 103 Nev. 503, 512 n. 4, 746 P.2d 132, 138 (1987).

² *Flamingo Realty, Inc. v. Midwest Development, Inc.*, 110 Nev. 984, 991-992, 879 P.2d 69, 73-74 (1994) (cites omitted).

Pursuant to FRCP 12(f) Motion to Strike:

(f) MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

In this case the claims for relief are redundant and simply designed to cause additional expense and time to the Plaintiff. Further, it is possible that any award under the claims could be considered an abuse of discretion by the court. These claims should be made as affirmative defenses and nothing more. The claims are retaliatory, vexatious, unnecessary and designed simply to intimidate the Plaintiff and cause unnecessary expense.

Essentially, Randstad is arguing that Plaintiff is in breach of contract because they filed a breach of contract claim against Randstad. Further, that somehow, due to an indemnity clause, the Plaintiff must pay to represent Randstad against Plaintiff.

All this represents is an attempt to have multiple attorneys representing multiple factions of the same lawsuit for the same parties. That is, a set of attorneys representing Randstad paid for by Plaintiffs, and another representing Randstad paid for by Randstad, and ultimately attempting to seek attorney's fees for all from Plaintiff. This is an absurd and ridiculous possibility from the claims they have put forth, which are truly affirmative defenses. The attorney fees are a collateral matter handled by this court after the litigation has produced a judgment, assuming the attorney's fees are available by law, rule or contract. Not as damages to claims that are simply affirmative defenses.

In other words, Randstad is suggesting that Plaintiff does not have a right to file suit against Randstad. Nowhere in any document does it state that Plaintiff does not have a right to sue Randstad.

///

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1 In fact, the alleged agreement attached as Exhibit "A" to Defendant's Answer (attached
2 as **Exhibit "1"** hereto), Crossclaim and Counterclaim, is only a paycheck stub that must be filed
3 each and every week for the employee. It is not the original agreement entered into by the
4 parties. In other words, the Exhibit "A" agreement is a necessary document in order that the
5 employee be paid. Randstad appears to be bootstrapping that document into some sort of overall
6 governing agreement, even though it is signed *only to verify the hours of the employee*, as it
7 states under the signature.

8 After the Plaintiff has hired the person in question, after he has already been put in the
9 position and after having been given the authority and job functions of a controller, the very
10 position that Frontiera was hired for and that Randstad provided him for, Randstad is attempting
11 to rewrite the agreement in fine print on an hours report to take back the very reason for his
12 employment and the specific job functions that a controller would conduct.

13 Further, Randstad appears to avoid the statements made to the public on their website,
14 which are and were relied upon by the Plaintiff. That is:

15 vetted candidates

16 Randstad's finance and accounting staffing experts are highly selective
17 when choosing candidates for client introductions. **Each candidate**
18 undergoes a qualification process that includes an extensive interview,
19 reference check, degree verification and, if necessary, skills testing. Our
finance and accounting staffing experts add valuable insight to deliver
right-fit candidates. (See, **Exhibit "2"**, attached hereto – emphasis added).

20 The website provides further affirmative statements regarding providing certain types of
21 positions and the ability to provide qualified personnel, such as controllers and other high level
22 executives. The representations in the counterclaim, are simply factual argument for an
23 affirmative defense.

24 Alternatively, pursuant to FRCP 12(b)(6):

25 (b) How to Present Defenses. Every defense to a claim for relief in any
26 pleading must be asserted in the responsive pleading if one is required.
27 But a party may assert the following defenses by motion:
(6) failure to state a claim upon which relief can be granted; ...

28 A pleading is subject to dismissal unless it alleges "enough facts to state a claim to relief

1 that is plausible on its face.”³ This generally occurs in two circumstances: (i) the absence of a
2 cognizable legal theory, or (ii) there are insufficient facts under a cognizable legal claim.⁴

3 In this case, Randstad’s claims fail to state a claim upon which relief can be granted as
4 Randstad’s causes of action are nothing but disguised affirmative defenses. Randstad seeks
5 nothing but legal fees for having to defend the complaint, and indemnification of the same. No
6 separate cause of action exists in Nevada for attorney fees as they are an ancillary matter.⁵


7 Having to file an answer to affirmative defenses to what are affirmative defenses is a
8 waste of time, confusing and only creates additional costs and expenses throughout this action.

9 III. CONCLUSION

10 In accordance with the foregoing, Plaintiff respectfully requests that Defendant/Counter-
11 Claimant Randstad’s Counterclaim be stricken such that the claims remain only as affirmative
12 defenses pursuant to FRCP 8(c)(2) and require no answer, or in the alternative, dismissed in its
13 entirety pursuant to FRCP 12(b)(6).

14 DATED this 3rd day of May 2016.

15 **BLACK & LOBELLO**

16 
17 _____
18 STEVEN MACK, ESQ.

19 Nevada Bar No. 4000
20 10777 W. Twain Ave., Third Floor
21 Las Vegas, Nevada 89135
22 *Attorneys for Plaintiff*
23
24

25 ³ See, *Straznick v. Desert Springs Hosp.*, 642 F. Supp. 2d 1238, 1240 (D. Nev. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-58 (2007)). Federal cases interpreting the Federal Rules of
26 Civil Procedure are “strong persuasive authority, because the Nevada Rules of Civil Procedure are based
27 in large part upon their federal counterpart.” *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119,
28 787 P.2d 772, 776 (1990)).

⁴ *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

⁵ See, *Ace Truck, Infra.* And *Flamingo, Infra.*

CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 3rd day of May, 2016, I caused the above and foregoing document entitled **PLAINTIFF/COUNTERDEFENDANT'S MOTION TO STRIKE COUNTERCLAIM OR IN THE ALTERNATIVE, MOTION TO DISMISS** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

☐ by electronic service through the Federal Court's ECF system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered

to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

MICHAEL C. MILLS, ESQ.
BAUMAN LOEWE WITT & MAXWELL, PLLC
3650 N. Rancho Dr. Ste 114
Las Vegas, NV 89130
Attorneys for Defendant
Randstad Professionals US, LP dba Randstad
Professionals

THERESA MAINS, ESQ.
2251 N. Rampart Blvd. #102
Las Vegas, NV 89128
Attorneys for Defendant
Joseph Frontiera

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

/s/ Shirley Blackburn
An Employee of Black & LoBello

EXHIBIT “1”

EXHIBIT “1”

RANDSTAD FINANCE & ACCOUNTING SERVICE AGREEMENT

Thank you for choosing Randstad Finance & Accounting to assist with your staffing needs. Outlined below are the parameters of our agreement with you. If you have any questions, please contact your local Randstad F&A representative for assistance.

Cost of Services

Direct Hire - Randstad F&A's fees are on a contingency basis. The detailed search required to match a client with a candidate is conducted at no charge. Your acceptance of our referral of a candidate constitutes your acceptance of this schedule of fees and these terms and conditions. Updates modified in writing and signed by us. The fee is charged when the search is complete and you accept the candidate for hire. Direct hire fees are based on one percent (1%) per thousand dollars of total full-time annual compensation, to a maximum fee of thirty percent (30%). For example, the fee on an annual compensation of \$50,000 plus a bonus of \$10,000 would be 10% of \$60,000, or \$6,000. Fees are calculated on a full-time basis.

Project - Randstad F&A's fees are based on a number of factors which include: specific job needs, job description, responsibilities, length of project, availability of candidates and demographics. The fee rate includes applicable payroll charges such as social security, federal, state and local withholding taxes, workers' compensation insurance, unemployment taxes and state disability insurance, if applicable. The total hours billed to you are based on a weekly timesheet signed by you at the end of each week and at the end of the project. In signing, you agree with the provisions stated. Candidates working on a project will be paid overtime as required by state and federal wage and hour laws and blood accordingly.

Conversion - The person assigned to a project is an employee of Randstad F&A. Should you wish to convert this person to your employ, you agree to pay a conversion fee equal to one percent (1%) per thousand dollars of total full-time annual compensation to a maximum of thirty percent (30%).

Your organization is responsible for direct hire and/or conversion fees should you not a Randstad F&A candidate, regardless of employment classification, for all candidates hired within one (1) year from the date of referral or the end of the project. You also agree to pay a fee should our candidate be hired by a subsidiary or other related company under your common control, or by another company to whom you have referred our candidate, including any staffing services.

Payment Terms

Invoices are due and payable upon receipt. All invoices over 30 days old are subject to a finance charge of one and one-half percent (1 1/2%) per month on the unpaid balance. We may request bank information before working on a project or direct hire position. This information is held strictly confidential.

Guarantees

Direct Hire - Randstad F&A provides an unconditional, one hundred (100) day replacement guarantee on all of our candidates you hire. Should the candidate voluntarily leave or be terminated for any reason other than in connection with a reduction in workforce, lack of work or other reason unrelated to referred candidate's performance during the one hundred (100) days following the start date, we will replace the candidate at no charge. This replacement must occur within six (6) months from the date of notification.

Conversion from Project to Direct Hire - When a candidate working on a project converts to direct hire status, the above direct hire replacement guarantee applies. The date our employee started the project is the date used as the beginning of the one hundred (100) days.

These replacement guarantees apply only if the full fee is paid within ten (10) days of the start date of the candidate and Randstad F&A is notified of the situation within the one hundred (100) days.

Project - If you are dissatisfied for any reason with the candidate assigned to you and you notify Randstad F&A during the first day of the assignment, you will not be charged for the first eight (8) days worked.

Client Responsibility

As a client of Randstad F&A, you agree that all services provided by our candidate will be performed under your exclusive and qualified direction, supervision and control. Randstad F&A will have no responsibility for supervising or directing the work of a candidate. Client agrees that it will not accept candidates to handle cash or credit card transactions, have authority to transfer funds, make payments or disburse funds, have access to check signing equipment or other valuable property, take responsibility for tax deadlines, have access to trade secret information, have a key to the office, take work, documents or equipment (including laptop) off-site, operate client's leased or owned vehicles, travel without prior written permission from Randstad F&A or perform any other tasks or have any responsibility inconsistent with sound internal control practices. Candidates are not allowed to sign any document on behalf of Randstad F&A. Candidates are not permitted to render any written legal or accounting opinion, or any opinion of certification that requires a signature, stamp or seal of a licensed professional. Client acknowledges that Randstad F&A provides staffing services, is not a public accounting firm and that it has as necessary internal accounting controls in place. Client agrees that if it suspects or discovers any indication of impropriety by candidate, client will notify Randstad F&A immediately and in any case, no later than ten (10) days from discovery.

Client acknowledges that it has previously employed a candidate named and/or known from another source. Client shall so notify Randstad F&A in writing within twenty-four hours. If this notification is not received, such candidate will be considered to be represented by Randstad F&A.

Client acknowledges that it is in compliance with all applicable laws, including equal employment opportunity, health and safety regulations. Randstad F&A candidate references information furnished on a candidate, but does not guarantee its accuracy. In establishing candidates for direct hire, client should thoroughly check Randstad F&A candidate with the same rigor as if it were hiring candidates directly. Randstad F&A does not conduct background, criminal or credit checks unless the client requests this service in writing, and pays the fees for such outside services.

To the extent permitted by law, the client will defend and indemnify Randstad F&A, its parent, subsidiaries, directors, officers, agents, representatives and employees for all claims, losses, and liability (including reasonable attorneys' fees) caused by the client's breach of this Agreement, its failure to disclose its duties and responsibilities set forth within the Client Responsibility section herein or the negligence, gross negligence or willful misconduct of the client, its officers, employees or authorized agents in the discharge of these duties and responsibilities.

Randstad F&A will make every reasonable effort to resolve any problem that arises during our services. In the event legal action is instituted by either party to enforce any part of this Agreement, the prevailing party will be entitled to all reasonable attorneys' fees and other legal costs incurred in such actions. In no event shall either party be liable to the other party for indirect, special or consequential or punitive damages. This is the entire agreement between the parties and supersedes all previous written or oral agreements. Your acceptance of resume, referral or candidate from Randstad F&A constitutes your acceptance of the service agreement.

Thank you for choosing Randstad Finance & Accounting to assist with your staffing needs.

THE RANDSTAD FINANCE & ACCOUNTING SERVICE AGREEMENT

EMPLOYEE DATA		
LAST NAME	FIRST NAME	DATE
XXX - XX - 5979		
LAST FOUR DIGITS OF SOCIAL SECURITY #		
1000000000		
THANK YOU		

CLIENT DATA		
COMPANY NAME	ADDRESS	DATE
Counters Customs	2916 Highlands	
LAS VEGAS		
THANK YOU		

PLEASE FAX TO YOUR RANDSTAD F&A BRANCH											
MONTH		DAY		YEAR		FAX NUMBER		FAX NUMBER		FAX NUMBER	
300		97		6		30		13			
DATE		TIME		DATE		TIME		DATE		TIME	
4/24		8:00		4/25		8:00		4/26		8:00	
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4/30		8:00		5/1		8:00		5/2		8:00	
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5/6		8:00		5/7		8:00		5/8		8:00	
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9/24		8:00		9/25		8:00		9/26		8:00	
9/27		8:00		9/28		8:00		9/29		8:00	
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EXHIBIT “2”

EXHIBIT “2”

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- CFAs
- Tax accountants
- Investment analysts

Support

- Bookkeeper

- Director of Accounting
- Tax Manager
- Audit Manager
- Clerk
- Underwriter

return to staffing

EXHIBIT “2”

EXHIBIT “2”

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Theresa@TheresaMainsPA.Com
Attorney for Defendant/Cross Defendant

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

COUNT'S KUSTOMS, LLC

Plaintiff,

vs.

JOSEPH FRONTIERA, an Individual, and
RANDSTAD PROFESSIONALS, DOES I
through X, and DOE CORPORATIONS XI
through XX, inclusive,

Defendants.

RANDSTAD PROFESSIONALS US, LP,
Plaintiff in Counterclaim,

vs.

COUNT'S KUSTOMS, LLC,
Defendant in Counterclaim,

RANDSTAD PROFESSIONALS US, LP,
Cross Claimant

vs.

JOSEPH FRONTIERA,
Cross Defendant

CASE NO: 2:16-CV-00910-JAD-GWF

**DEFENDANT/CROSS DEFENDANT
FRONTIERA'S MOTION TO DISMISS
COMPLAINT PURSUANT TO FED. R. CIV.
P. 9(b) AND 12(b)(6)**

Theresa Mains, Esq., MACC, CFE
2251 N. Rampart Blvd., Suite 102
Las Vegas, Nevada 89128

1 Defendant/Cross Defendant Joseph Frontiera (“Frontiera” or “Defendant”)
2 respectfully moves to dismiss, with prejudice, Plaintiff Count’s Kustoms, LLC’s (“Plaintiff”)
3 Complaint (ECF 4-1) for failure to plead their claims with particularity as required by Fed.
4 R. Civ. P. 9(b) and for failure to state a claim under Fed. R. Civ. P. 12(b)(6). This Motion
5 is made and based upon the following memorandum of points and authorities, the pleadings
6 and papers filed and any oral argument this Court may entertain.
7

8
9 Dated: May 9, 2016

10 Respectfully submitted,

11 /s/Theresa Mains

12 Theresa Mains, Esq. MAcc, CFE
13 2251 N. Rampart Blvd., Suite 102
14 Las Vegas, Nevada 89128

15 Theresa@TheresaMainsPA.com

16 *Attorney for Defendant/Cross Defendant*
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Las Vegas, Nevada 89128

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs assert several improperly pled causes of action that all center around conclusory and generalized allegations of fraud and conversion allegedly committed by Defendant. The core or centralized assertions made against by the Plaintiff in the Complaint are allegations of fraudulent conduct and conversion the Plaintiff relies on these allegations as the basis of all claims. When “the claim[s] [are] said to be grounded in fraud or to sound in fraud, and the pleading ... *as a whole must* satisfy the particularity requirement of Rule 9(b).¹

Plaintiffs have failed to provide the detailed factual allegations necessary to plead fraud and the fraud-based claims as required by Fed. R. Civ. P. 9(b). Plaintiffs fail to provide facts that directly or even by inference answer the fundamental questions of what was done, when, and how.

II. GENERAL ALLEGATIONS AND CAUSES OF ACTION ASSERTED AGAINST DEFENDANT FRONTIERA

On or around June 6, 2013, Defendant Frontiera was hired by Plaintiff through the employment agency, Defendant Randstad (“Randstad”) to serve as the “General Manager to assist in the day to day operations including but not limited to hiring, marketing, accounting, daily operations decisions, task assignments, inventory control, scheduling, collections, garage operations, and restoration projects *in the absence of management*.”² Compl. ¶5.

¹ See *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir.2009) (holding that when a plaintiff alleges a unified course of fraudulent conduct and relies on that allegation as the basis of a claim, “the claim is said to be grounded in fraud or to sound in fraud, and the pleading ... as a whole must satisfy the particularity requirement of Rule 9(b).”) (internal quotation marks omitted).

² Emphasis added.

1 Defendant Frontiera's main responsibilities were to "keep operations running
2 smoothly and to make sure the vehicles being worked on were completed in a timely manner."
3 Compl. ¶6. In order to do his job, Plaintiff added Frontiera as a signor to the accounts at
4 Count's Kustoms. Compl. ¶11. Plaintiffs added that Frontiera "reported to Kevin Mack and
5 Daniel N. Koker, II, and was to run the business day to day *as well as in their absence*."³
6 Compl. ¶12.

7
8 Plaintiffs then assert allegations of misconduct that "unbeknownst to Plaintiff,"
9 Frontiera had signature stamps made of Daniel N. Koker and Kevin Mack "for the purpose of
10 stamping checks in their absence" and such stamps were "not authorized by Daniel Koker or
11 Kevin Mack." Compl. ¶13. Plaintiffs add a bare assertion without any specificity, that "upon
12 hiring of Frontiera, "he began using Plaintiff's finances for personal reasons not authorized
13 by Plaintiff or Plaintiff's upper management." Compl. ¶14.

14
15 Plaintiff then provides additional bare assertions with general averments that lack in
16 any specificity as to the how, what, when, why:

- 17 "CK monies were used by Frontiera for his personal use believed to
18 be in excess of \$75,000.00 and was discovered through investigation,
19 including but not limited to:
20 a. Down payment of a personal vehicle, Land Rover Range Rover, in the
21 amount of \$5,800.00.
22 b. Airline tickets for personal use in the amount of \$5,104.00.
23 c. Services paid for by Count's Kustoms for Defendant Frontiera's personal
24 vehicles in the amount of \$14,317.50." Compl. ¶15.

25
26 Plaintiffs allege that Frontiera represented himself as a qualified employee without
27 negative employment history.⁴ Compl. ¶33.

28
³ Emphasis added.

⁴ Plaintiff's fail to assert when and to whom and how this alleged representation was made but for the sake of this Motion, it is assumed that Plaintiffs are referring to representations made on whatever application documentation processed through Randstad.

1 The Plaintiffs allege four causes of action against Frontiera: (i) Fraud. Compl. at p. 6,
2 ¶¶ 30-40; (ii) Unjust Enrichment. Compl. at p. 7, ¶¶ 46-51; (iii) Conversion/Constructive
3 Trust. Compl. at p. 8, ¶¶ 52-56; (iv) Embezzlement – Civil Theft. Compl. at p. 8, ¶¶ 57-62.
4

5 6 **III. LEGAL ARGUMENT**

7 **A. Fed. R. Civ. P. 12(b)(6)**

8 Rule 12(b)(6) motion tests the legal sufficiency of a claim.⁵ A court accepts as true
9 all well-pleaded allegations of material fact and construes them in the light most favorable to
10 the nonmoving party.⁶ However, the court is not required to accept as true allegations that
11 are merely conclusory, unwarranted deductions of fact or unreasonable inferences.⁷
12

13 A motion to dismiss under Rule 12(b)(6) also concerns what facts a plaintiff must
14 plead on the face of his complaint. Under Rule 8(a)(2) of the Federal Rules of Civil
15 Procedure, a complaint must include “a short and plain statement of the claim showing that
16 the pleader is entitled to relief.” Any complaint that does not meet this requirement can be
17 dismissed pursuant to Rule 12(b)(6).
18

19 In interpreting Rule 8(a)’s “short and plain statement” requirement, the Supreme
20 Court has held that a plaintiff must plead “enough facts to state a claim to relief that is
21 plausible on its face,” which requires that “the plaintiff plead factual content that allows the
22 court to draw the reasonable inference that the defendant is liable for the misconduct
23 alleged.”⁸ This standard does not ask the Plaintiff to plead facts that suggest he will probably
24

25
26 ⁵ *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001).

27 ⁶ *Daniels–Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir.2010).

⁷ *Weingartner*, 702 F.Supp.2d at 1285; *see Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.2001).

28 ⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

1 prevail, but rather “it asks for more than a sheer possibility that a defendant has acted
 2 unlawfully.”⁹ The Court must “accept factual allegations in the complaint as true and
 3 construe the pleadings in the light most favorable to the nonmoving party.”¹⁰ *The Court is*
 4 *not, however, forced to “assume the truth of legal conclusions merely because they are*
 5 *cast in the form of factual allegations.”*¹¹

8 **B. Fed. R. Civ. P. 9(b)**

9 Fed. R. Civ. P. 9(b) states, “[i]n alleging fraud or mistake, a party must state with
 10 particularity the circumstances constituting fraud or mistake.”¹² “Rule 9(b) serves not only
 11 to give notice to defendants of the specific fraudulent conduct against which they must
 12 defend, but also to deter the filing of complaints as a pretext for the discovery of unknown
 13 wrongs, to protect defendants from the harm that comes from being subject to fraud charges,
 14 and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society
 15 enormous social and economic costs absent some factual basis.”¹³

17 Allegations in a must be “specific enough to give defendants notice of the particular
 18 misconduct which is alleged to constitute the fraud charged so that they can defend against
 19 the charge and not just deny that they have done anything wrong.”¹⁴ Thus, *claims sounding*
 20 *in fraud must allege “an account of the time, place, and specific content of the false*
 21

22
23
24
25 ⁹ *Id.* (internal quotation marks omitted).

26 ¹⁰ *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir.2008).

27 ¹¹ *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir.2011).

28 ¹² *Id.*

¹³ *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1057 (9th Cir.2011) (citing *Bly–Magee v. California*, 236 F.3d 1014, 1018 (9th Cir.2001)).

¹⁴ *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir.1985).

1 *representations as well as the identities of the parties to the misrepresentations.*¹⁵ A
 2 plaintiff must set forth what is false or misleading about a statement, and why it is false.”¹⁶
 3 However, “intent, knowledge, and other conditions of a person’s mind” need not be stated
 4 with particularity, and “may be alleged generally.”¹⁷
 5

6
 7 ***C. Fraud Claim Must Be Dismissed Because Plaintiff Failed to Plead with The***
 8 ***Particularity Required by Fed. R. Civ. P. 9(b)***

9 Plaintiff claims that Frontiera represented himself as a qualified employee without
 10 negative employment history. Compl. ¶33. This is the only allegation for fraud in this cause
 11 of action for fraud.

12 The elements necessary for a fraud claim have been established by the Nevada
 13 Supreme Court: 1) a false representation made by the defendant; 2) defendant’s knowledge
 14 or belief that its representation was false; 3) defendant intended to induce plaintiff to act or
 15 refrain from acting upon the misrepresentation; and 4) damage to the plaintiff as a result of
 16 relying on the misrepresentation.¹⁸
 17

18 Plaintiff does not plead any of these elements. Plaintiff attempts to provide somewhat
 19 of a narrative of surrounding circumstances of this alleged fraud and asserts, “[a]fter Plaintiff
 20 began finding irregularities in its accounting as well as some of the clients’ accounts and
 21 projects, Plaintiff conducted its own background screening and found that Defendant
 22
 23

24
 25 ¹⁵ *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir.2007) (per curiam) (internal quotation marks and citation omitted).

26 ¹⁶ *In re GlenFed, Inc. Securities Litig.*, 42 F.3d 1541, 1548 (9th Cir.1994) (en banc), superseded by statute on other grounds as stated in *Marksman Partners, L.P. v. Chantal Pharmaceutical Corp.*, 927 F.Supp. 1297, 1309 (C.D.Cal.1996).

27 ¹⁷ Fed. R. Civ. P. 9(b).

28 ¹⁸ *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382, 1386 (Nev.1998).

1 Frontiera had, in fact, a criminal history with a past employer in Florida for embezzlement
2 and fraud.” ¶34.

3 When a party pleads a cause of action for fraud or mistake, he is subject to the
4 heightened pleading requirements of Rule 9(b). “In alleging fraud or mistake, a party must
5 state with particularity the circumstances constituting fraud or mistake.”¹⁹ A plaintiff must
6 set forth what is false or misleading about a statement, **and why it is false.**”²⁰
7

8 Rule 9(b) demands that the circumstances constituting any alleged fraud be plead
9 “specific[ally] enough to give defendants notice of the particular misconduct ... so that they
10 can defend against the charge and not just deny that they have done anything wrong.”²¹ Claims
11 of fraud must be “accompanied by the who, what, when, where, and how of the misconduct
12 alleged.”²² Why is this representation false? Plaintiff does not provide any other detail to
13 this alleged “fact” such as a case number or other detail. Plaintiff does not link to this alleged
14 misrepresentation to any misconduct or cause for damages, nor does the Plaintiff provide any
15 facts for particular documentation to suggest this representation is false OR that the Defendant
16 intended to make a false representation.
17

18 Therefore, Plaintiff has failed to meet the heightened pleading standard and therefore
19 this claim for fraud must be dismissed.
20
21
22
23

24 ¹⁹ Fed. R. Civ. P. 9(b) (“Malice, intent, knowledge, and other conditions of a person’s mind may be alleged
25 generally.”).

26 ²⁰ *In re GlenFed, Inc. Securities Litig.*, 42 F.3d 1541, 1548 (9th Cir.1994) (en banc), superseded by statute on
other grounds as stated in *Marksmen Partners, L.P. v. Chantal Pharmaceutical Corp.*, 927 F.Supp. 1297, 1309
(C.D.Cal.1996).

27 ²¹ *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir.2009) (citing *Bly–Magee v. California*, 236 F.3d 1014,
1019 (9th Cir.2001)) (emphasis added).

28 ²² *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.1997).

D. Unjust Enrichment Claim Must Be Dismissed Because Plaintiff Failed to Plead with The Particularity Required by Fed. R. Civ. P. 9(b)

Plaintiff claims that Frontiera “used his position as shop manager to his personal monetary advantage, without approval of Plaintiff’s upper management, and monetarily harming Plaintiff without benefit to Plaintiff.” Compl. ¶48. Plaintiffs further plead that “it would be inequitable and unjust to allow Defendant to “reap the benefits of their wrongful conduct.” Compl. ¶49.

To plead a claim for unjust enrichment, a plaintiff must allege that a defendant unjustly retained money or property of another against fundamental principles of equity.²³ The Plaintiffs do not provide facts or specifics as to whether there was an implied contract between Plaintiff and Frontiera. If Plaintiffs are having this Court and Defendant infer they are referring to an express agreement between Plaintiffs and Frontiera then this cause of action should be dismissed. An action for unjust enrichment cannot lie when there is an “express written contract” that governs the parties’ relationships.²⁴

Plaintiff’s by their allegation that Frontiera used his “position as shop manager to his personal monetary advantage” almost implies that Frontiera, as a fiduciary or a person in position of trust, used the position for monetary advantage. However, because there are no facts or other specific particulars to back up this very bare empty assertion, Defendant Frontiera cannot defend himself²⁵ and cannot.... This claim of unjust enrichment is not pled properly and there are no facts to apply to the mere recited elements.

²³ *Laughlin v. MidCountry Bank*, No. 3:10-cv-0294-LRH-VPC, 2011 WL 2174972, at *1-4 (D.Nev. June 3, 2011).

²⁴ *Id.* (citing *LeasePartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 942 P.2d 182, 187 (Nev.1997))

²⁵

1 This claim for unjust enrichment must be pled with particularity and is not. The core
 2 allegation central to Plaintiff's Complaint is fraud and conversion, therefore, "although not
 3 specifically framed as a fraud claim in the Complaint, a claim that something was accepted
 4 or encouraged under [fraud or conversion] under the Rule 9(b) heighten pleading standard."²⁶
 5 And in order to satisfy Rule 9(b), a pleading must identify 'the who, what, when, where, and
 6 how of the misconduct charged,' as well as 'what is false or misleading about [the purported
 7 use of Frontiera's position that led to monetary gain], and why it [led to monetary gain].'"²⁷

9 Plaintiff does not allege any other facts as to how Defendant used his "position as
 10 shop manager to his personal monetary advantage," or who Defendant allegedly used this
 11 position with, what he gained, how it was concealed from Daniel Koker or Kevin Mack who
 12 directly supervised Frontiera and whom Frontiera had to answer to.

14 This mere recital of the elements of Unjust Enrichment has one bare assertion relating
 15 to the Defendant does not meet any of the pleading standards and therefore must be
 16 dismissed.

18 ***E. Conversion/Constructive Trust Claims Must Be Dismissed Because Plaintiff
 Failed to Plead with The Particularity Required by Fed. R. Civ. P. 9(b)***

19 Conversion and constructive trust are two different causes of actions. The Plaintiffs
 20 lists the bare recitals of the elements of Conversion only in this section. Compl. at p. 8, ¶¶
 21 52 – 56.

26 See, e.g., *Josephson v. EMC Mortg. Corp.*, No. 2:10-cv-336-JCMPAL, 2010 WL 4810715, at *2 (D.Nev. Nov.19, 2010) (Plaintiffs claimed that their signature was obtained under false pretenses and the court dismissed the claim because plaintiffs' claim did not meet the heightened Rule 9(b) fraud pleading standards).

27 *Cafasso*, 637 F.2d at 1055 (citing *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir.2010)).

1 Treating this cause of action as separate, Plaintiff's claim for constructive trust must
 2 be dismissed because not only is not pled at all, therefore not properly, it is not "essential to
 3 the effectuation of justice in this case."²⁸

4 In Nevada, a constructive trust is "a remedial device by which the holder of legal title
 5 to property is held to be a trustee of that property for the benefit of another who in good
 6 conscience is entitled to it."²⁹ A constructive trust may be appropriate where: "(1) a
 7 confidential relationship exists between the parties; (2) retention of legal title by the holder
 8 thereof against another would be inequitable; and (3) the existence of such a trust is essential
 9 to the effectuation of justice."³⁰ Where a plaintiff can maintain an action at law and the legal
 10 remedy is adequate, sort to equity is not appropriate.³¹ Therefore this cause of action must be
 11 dismissed.
 12

13 Under Nevada law, conversion is the wrongful exertion of control over personal
 14 property in derogation of another's rights or title in the property. Plaintiffs lack allegations
 15 and facts to show that *Defendant wrongfully exerted* control over any personal property of the
 16 Plaintiff. They do not provide the specific facts as demanded under Rule 9(b) regarding the
 17 circumstances constituting any alleged fraud be plead "specific[ally] enough to give
 18 defendants notice of the particular misconduct ... so that they can defend against the charge
 19 and not just deny that they have done anything wrong."³² Claims of fraud must be
 20 "accompanied by the who, what, when, where, and how of the misconduct alleged."³³
 21
 22
 23
 24

25 ²⁸ *Crockett & Myers v. Napier, Fitzgerald & Kirby*, 440 F.2d 1184, 1198 (D. Nev. 2006).

26 ²⁹ *Locken v. Locken*, 98 Nev. 369, 650 P.2d 803, 804-05 (1982).

27 ³⁰ *Id.* at 805.

28 ³¹ *See Davenport v. State Farm Mut. Auto. Ins. Co.*, 81 Nev. 361, 404 P.2d 10, 13 (1965).

³² *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir.2009) (*citing Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir.2001)) (emphasis added).

³³ *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.1997).

1 How was did the Defendant allegedly obtain signature stamps? How was the money
2 allegedly used for his personal use taken and concealed? These are facts imperative to allege
3 unlawful control and conversion of funds or assets.

4 Plaintiffs fail to state a claim which relief can be granted and they fail to meet the
5 heightened pleading requirements of 9(b). Therefore, this claim must be dismissed.
6

7 ***F. Embezzlement/Civil Theft Claim Must Be Dismissed Because Plaintiff Failed***
8 ***to State a Claim for Which Relief Can be Granted and Failed to Plead with***
9 ***The Particularity Required by Fed. R. Civ. P. 9(b)***

10 There is no private right of action under a criminal statute, unless it is specifically
11 provided in the statute. The United States Supreme Court explained:

12 We have been quite reluctant to infer a private right of action from a
13 criminal prohibition alone; . . . for example, we refused to infer a private
14 right of action from "a bare criminal statute." And we have not suggested
15 that a private right of action exists for all injuries caused by violations of
16 criminal prohibitions...[Instead, the] [q]uestion of the existence of a
17 statutory cause of action is, of course, one of statutory construction [...].³⁴

18 NRS 205.0832 is a criminal statute for theft and NRS 205.300 is the criminal statute for
19 embezzlement. Neither provide for a civil cause of action. In Nevada, only a Nevada
20 prosecutor would take action against the crime of theft under that statute.³⁵ Similarly only a
21 Nevada prosecutor would take action against the crime of embezzlement under that statute.³⁶

22 It appears as to how this cause of action was pled, as stated above, the theme of
23 Plaintiff's complaint and allegations is a "unified course of fraudulent conduct and relies on
24 that allegation as the basis of a claim, 'the claim is said to be grounded in fraud or to sound
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26
27 ³⁴ Central Bank of Denver, NA. v. First Interstate Bank of Denver, NA., 511 U.S. 164, 190, 114 S.Ct. 1439,
1455 (1994) (internal quotation marks and citations omitted) (emphasis added).

28 ³⁵ See, e.g., *State v. Hancock*, 114 Nev. 161, 955 P.2d 183 (1998).

³⁶ See, e.g., *Batin v. State*, 118 Nev. 61, 38 P.3d 880 (2002).

1 in fraud, and the pleading ... as a whole must satisfy the particularity requirement of Rule
 2 9(b).”³⁷

3 As described above, Plaintiffs fail to state a claim which relief can be granted and
 4 they fail to meet the heightened pleading requirements of 9(b). Therefore, this claim must
 5 be dismissed.
 6

7 IV. CONCLUSION

8 For all of these reasons discussed, Defendant Frontiera respectfully asks this Court
 9 to dismiss the four claims against Frontiera with prejudice.
 10

11 Dated: May 9, 2016
 12

13 Respectfully submitted,

14 /s/Theresa Mains

15 Theresa Mains, Esq. MAcc, CFE
 16 2251 N. Rampart Blvd., Suite 102
 17 Las Vegas, Nevada 89128
 18 Theresa@TheresaMainsPA.com
 19 Attorney for Defendant/Cross Defendant
 20

21 CERTIFICATE OF SERVICE

22 On May 9, 2016, I served the Defendant Frontiera’s Motion to Dismiss Complaint
 23 via the United States District Court CM/ECF System which will provide copies to all
 24 counsels of record:
 25

26
 27
 28 ³⁷ See *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir.2009).

1 Steven J. Mack
 2 Black & LoBello
 3 10777 West Twain Ave., Ste. 300
 4 Las Vegas, NV 89135
 5 7028698801
 6 Fax: 7028692669
 7 Email:
 8 Smack@BlackLobelloLaw.com
 9 *Attorney for Plaintiff/Counter Defendant*

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*Attorneys for Defendant/Counter
 Plaintiff/Claimant*

/s/ Theresa Mains, Esq.

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EXHIBIT “3”

EXHIBIT “3”

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Attorneys for Plaintiff/Counterdefendant

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

COUNT'S KUSTOMS, LLC, a Nevada corporation,
Plaintiff,

vs.

JOSEPH FRONTIERA, an individual, and
RANDSTAD PROFESSIONALS US, LP a
Delaware Corporation dba RANDSTAD
PROFESSIONALS, DOES I-X and DOE
CORPORATIONS XI – XX, inclusive,

RANDSTAD PROFESSIONALS US, LP,
Counterclaimant,

vs.

COUNT'S KUSTOMS, LLC,
Counterdefendant.

RANDSTAD PROFESSIONALS US, LP,
Cross-Claimant,

vs.

JOSEPH FRONTIERA,
Cross-Defendant.

Case No.: 2:16-cv-00910-JAD-GWF

**PLAINTIFF'S MOTION TO STRIKE
DEFENDANT FRONTIERA'S MOTION
TO DISMISS AS UNTIMELY**

BLACK & LOBELLO
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Las Vegas, Nevada 89135
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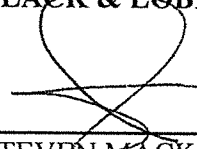
**PLAINTIFF'S MOTION TO STRIKE DEFENDANT FRONTIERA'S MOTION
TO DISMISS AS UNTIMELY**

Plaintiff/ Counterdefendant, COUNT'S KUSTOMS, LLC, ("Plaintiff" or "CK"), by and through its attorney Steven Mack, Esq. of the law firm of Black & LoBello hereby submits its Motion to Strike Defendant/Cross-Defendant, Joseph Frontiera's Motion to Dismiss as Untimely.

This Motion is made and based upon the pleadings and papers filed in this matter, the Exhibits attached hereto, and any argument or other evidence produced at the time of this hearing.

DATED this 13th day of May, 2016.

BLACK & LOBELLO


STEVEN MACK, ESQ.
Nevada Bar No. 4000
10777 W. Twain Ave., Third Floor
Las Vegas, Nevada 89135
Attorneys for Plaintiff

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

This is an action that exists as a result of Randstad's failure to perform basic vetting of a candidate that was provided to the Plaintiff, and that person, Frontiera, committed multiple improper and illegal acts causing substantial damages to Plaintiff.

A Complaint was filed in District Court on March 22, 2016 and served upon Defendant Randstad on March 28, 2016. Randstad filed an answer, counterclaim and cross claim on April 18, 2016.

The Complaint and Summons were served on Defendant Frontiera on April 4, 2016.

This case was removed to Federal Court on April 22, 2016.

1 Counsel for Defendant/Counter-Defendant Frontiera first made an appearance in this case
2 on April 27, 2016, and then requested an extension to answer or otherwise plead to the case.

3 Counsel signed a Stipulation to Extend the Time to Respond to Initial Complaint which
4 was filed May 5, 2016. The Stipulation gave Defendant/Counter-Defendant Frontiera until May
5 9, 2016 to file a responsive pleading to Plaintiff's Complaint. Defendant/Counter-Defendant
6 Frontiera did not file his responsive pleading until May 10, 2016.

7 II. ARGUMENT

8 This Motion is made pursuant to FRCP 12(f)(2), wherein Plaintiff was served the
9 responsive pleading, however, the pleading was untimely, and should be stricken and Defendant
10 Frontiera should be forced to file an answer to the complaint.

11 Pursuant to FRCP 12(a)(1)(A) "A defendant **must** serve an answer: (i) within 21 days
12 after being served with the summons and complaint" (emphasis added).

13 Although an extension was granted by this Court and agreed to by Plaintiff, the extension
14 was granted to May 9, 2016, not May 10. The same rule applies, in that the responsive pleading
15 **must** be filed by the extended time. Timing rules are strictly construed.¹

16 Defendant was late and the responsive pleading should be stricken.

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27 ¹ *Willms v. Sanderson*, 723 F.3d 1094 (9th Cir. 2013) time frames for filing complaint objecting to
28 discharge is strictly construed. *Eastman v. First Data Corp.*, 736 F.3d 675 (3d Cir. 2013), Timing rules
are critical. Failure to strictly comply with them can result in dismissal (of an appeal in this particular
case), even when counsel makes what appears to be an honest error of interpretation.

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DATED this 13th day of May 2016.

STEVEN MACK, ESQ.
Nevada Bar No. 4000
10777 W. Twain Ave., Third Floor
Las Vegas, Nevada 89135
Attorneys for Plaintiff

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CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 13th day of May, 2016, I caused the above and foregoing document entitled **PLAINTIFF'S MOTION TO STRIKE DEFENDANT FRONTIERA'S MOTION TO DISMISS AS UNTIMELY** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

☒ by electronic service through the Federal Court's ECF system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered

to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

MICHAEL C. MILLS, ESQ.
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Randstad Professionals US, LP dba Randstad
Professionals

THERESA MAINS, ESQ.
2251 N. Rampart Blvd. #102
Las Vegas, NV 89128
Attorneys for Defendant
Joseph Frontiera

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

/s/ Shirley Blackburn
An Employee of Black & LoBello

EXHIBIT “4”

EXHIBIT “4”

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smack@blacklobellolaw.com
Attorneys for Plaintiff/Counterdefendant

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

COUNT'S KUSTOMS, LLC, a Nevada corporation,
Plaintiff,

vs.

JOSEPH FRONTIERA, an individual, and
RANDSTAD PROFESSIONALS US, LP a
Delaware Corporation dba RANDSTAD
PROFESSIONALS, DOES I-X and DOE
CORPORATIONS XI – XX, inclusive,

RANDSTAD PROFESSIONALS US, LP,
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vs.

COUNT'S KUSTOMS, LLC,
Counterdefendant.

RANDSTAD PROFESSIONALS US, LP,
Cross-Claimant,

vs.

JOSEPH FRONTIERA,
Cross-Defendant.

Case No.: 2:16-cv-00910-JAD-GWF

**PLAINTIFF, COUNT'S KUSTOMS,
LLC'S OPPOSITION TO DEFENDANT
JOSEPH FRONTIERA'S MOTION TO
DISMISS PURSUANT TO FED. R. CIV. P.
9(b) and 12(b)(6)**

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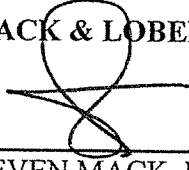
1 **PLAINTIFF, COUNT'S KUSTOMS, LLC'S OPPOSITION TO DEFENDANT JOSEPH**
2 **FRONTIERA'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 9(b) and**
3 **12(b)(6)**

4 Plaintiff COUNT'S KUSTOMS, LLC, ("Plaintiff") by and through Steven Mack, Esq.
5 of the law firm of Black & LoBello, submits this Opposition to Defendant, Joseph Frontiera's
6 ("Defendant" or "Frontiera") Motion to Dismiss.

7 This Opposition is made and based upon the Memorandum of Points and Authorities
8 attached hereto, all exhibits attached hereto, and such oral argument as may be entertained by
9 the Court at the time and place of the hearing of this matter.

10 DATED this 17th day of May 2016.

11 **BLACK & LOBELLO**

12 
13 _____
14 STEVEN MACK, ESQ.
15 Nevada Bar No. 4000
16 10777 W. Twain Ave., Third Floor
17 Las Vegas, Nevada 89135
18 *Attorneys for Plaintiff*

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. INTRODUCTION**

21 This is a case that was originally filed in Nevada State District Court, in accordance with
22 the Nevada State pleading rules, and was subsequently removed to Federal District based upon
23 a claim of diversity jurisdiction.

24 In filing the instant motion as a responsive pleading to the complaint, the Defendant is
25 too late, and waived their ability to bring a Motion to Dismiss. Pursuant to the stipulation to
26 extend the response date, as signed by this Court, the Defendant's responsive pleading was due
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28

1 to be filed with the court, no later than May 9, 2016.¹ Defendant Frontiera's responsive
2 pleading was filed May 10, 2016, without further stipulation by the parties and without this
3 Court's order. As a result, a Motion to Strike has been filed in this matter, and if granted, this
4 Opposition is Moot.

5 In the event this Court denies the Motion to Strike, this Opposition is as follows.

6 **II. STATEMENT OF FACTS**

7 This is an action that exists as a result of Randstad's failure to perform basic vetting of a
8 candidate that was provided to the Plaintiff, and that person, Frontiera, committed multiple
9 improper and illegal acts, including embezzlement, causing substantial damages to Plaintiff.
10 Had Frontiera disclosed his background, and Randstad performed as it should have, Plaintiff
11 would have known of Frontiera's prior criminal history, and would not have hired Frontiera, or
12 been damaged.

13 A complaint was filed on March 22, 2016 and served upon Defendant Randstad on
14 March 28, 2016. Randstad filed an answer, counterclaim and cross claim on April 18, 2016.
15 Defendant Frontiera filed the Motion to Dismiss on May 10, 2016.

16 **III. STANDARD OF REVIEW**

17 **A. FRCP Rule 12(b)(6)**

18 Dismissal is only warranted if "it appears beyond a doubt that the [claimant] can prove
19 no set of facts in support of his claim which would entitle him to relief."² "[D]etailed factual
20 allegations" are not required, ... but the Rule does call for sufficient factual matter, accepted as
21 true, to "state a claim to relief that is plausible on its face," ... A claim has facial plausibility
22 when the pleaded factual content allows the court to draw the reasonable inference that the
23 defendant is liable for the misconduct alleged."³

24 When reviewing a motion to dismiss a complaint under Fed. R. Civ. P. 12(b)(6) the
25 Plaintiff's Complaint is construed in the light most favorable to Plaintiff; the allegations of the
26

27 ¹ See Stipulation and Order, Docket 17

28 ² *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986).

1 Complaint are taken as true and *all* reasonable inferences that can be drawing from the
 2 Complaint are drawn in favor of Plaintiff.⁴

3 **B. FRCP Rule 8(a)(2)**

4 Under the Federal Rules of Civil Procedure, a complaint must contain “a short and plain
 5 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The
 6 purpose of a complaint is to give *fair notice* to a defendant and that the complaint provides
 7 ample facts to give a more than fair notice to a defendant and to enable defendant to respond to
 8 the complaint.

9 **C. FRCP Rule 9(b)**

10 The standard for the pleading of fraud has been, “[a]verments of fraud must be
 11 accompanied by ‘the who, what, when, where, and how’ of the misconduct charged.”⁵
 12 However, the Ninth Circuit has later recognized that “[t]o comply with Rule 9(b), allegations of
 13 fraud *must be specific enough to give defendants notice* of the particular misconduct which is
 14 alleged to constitute the fraud charged so that they can defend against the charge and not just
 15 deny that they have done anything wrong.”⁶

16 While a plaintiff must “state with particularity” the “circumstances constituting fraud,”
 17 there are certain things that “may be alleged generally,” “malice, intent, knowledge, and other
 18 conditions of a person’s mind.”⁷ Because things such as knowledge and intent are “uniquely
 19 within another party’s control,” they may be pled on information and belief.⁸

20 Apparently, the framers of Fed.R.Civ.P. 9(b) were cognizant of the fact that plaintiffs
 21 could not read defendants’ mind and could not find facts specific to defendants’ “intent”
 22 without the fact finding process of discovery.

23
 24 ³ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
 570 (2007)) (cites omitted).

25 ⁴ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2007); *National Audubon Soc., Inc. v. Davis*, 307 F.
 3d 835 (9th Cir. 2002).

26 ⁵ *Vess v. Cib-Giehy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting *Cooper v. Pickett*,
 137 F.3d 616, 627 (9th Cir. 1997)).

27 ⁶ *Swartz v. KP MG LLP* 476 F.3d 756, at 764 (9th Cir.2007); citing *Bly-Magee v. California*,
 236 F.3d 1014, 1019 (9th Cir.2001) (internal quotations omitted) (emphasis added).

28 ⁷ Fed.R.Civ.P. 9(b).

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IV. LEGAL ARGUMENT

Defendant, in this case, is unable to credibly argue, in the face of the very detailed Complaint, that Plaintiff has pled mere conclusory allegations. Further, Defendant cannot argue that he does not understand the nature of Plaintiff's claims or the fraud alleged, and cannot adequately respond. The facts listed in the complaint are specific and not based upon "information and belief", except to those facts that are not within the knowledge of the Plaintiff, such as where Frontiera obtained the fraudulent stamps.

In fact, the other Defendant, Randstad, named in one of the very same causes of action, had no problem understanding the nature of the fraud alleged and answered the Complaint.

Again, Rule 9(b) merely requires a summary of the details of the fraud, should be read in concert with Rule 8(a)(2), and does not demand or require a minute by minute recitation of each step of the fraud and the description of any and all evidence, including each and every document, which confirms its existence. The Standard relied by the Ninth Circuit is the who, what, when, where, why and how standard.⁹ While Plaintiff has provided far more specific information, a summary of the particulars of the allegations reveals the " who, what, when, where, why and how " of the fraud alleged. These are not conclusory statements, they are facts and a summary of what occurred. Other facts still remain in the sole knowledge of Frontiera, such as, exactly what was purchased in some of the cases, and where the property is located now.

a. With regard to Defendant Frontiera and Plaintiff's Third Claim for Relief:

WHO: Defendant Frontiera

WHAT Misrepresented his past and failed to disclose his past criminal history which included a prior criminal conviction for embezzlement.

WHERE: At Count's Kustoms.

WHEN: Prior to being hired in June 2013.

⁸ *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1330 (Fed. Cir. 2009).

⁹ See, *Vess*, *Infra*.

1 WHY: To obtain employment with Count's Kustoms. And it was false because he had a
2 criminal background, for the very crime that he committed at Plaintiff's business.

3 HOW: By failing to disclose his own criminal past at the time or prior to the time he was
4 hired in June 2013.

5 The summary of all these details are clearly within the Complaint and the cause of
6 action. Frontiera misrepresented his past, knew it was false, he induced Plaintiff to hire him and
7 Plaintiff was severely damaged as a result. And clearly, given what Frontiera did while he was
8 employed, would have made a difference. Count's Kustoms would not have hired him, had
9 they known about his past.

10 It doesn't state he misrepresented his past, it states he misrepresented his past and failed
11 to disclose his prior criminal charges, which happen to be similarly the subject of this lawsuit.

12
13 **b. With regard to Defendant Frontiera and Seventh Claim for Relief:**

14 This is a Fraud Claim and nowhere in the complaint, does it state or refer to the criminal
15 statutes pertaining to embezzlement.

16 WHO: Defendant Frontiera

17 WHAT Stole, used, appropriated or embezzled company funds and property to be used
18 for his own personal property and interests.

19 WHERE: At Count's Kustoms and other places while employed by Count's Kustoms

20 WHEN: Multiple times while employed at Count's Kustoms

21 WHY: To steal money and property, and deprive Count's Kustoms of its money and
22 property for his own personal benefit including purchasing a vehicle for himself, personal items
23 at Home Depot, to purchase personal airlines tickets and services for his personal vehicles, to
24 name just a few.

25 HOW: By making false signature stamps of those authorized to sign on checks, by
26 misusing company credit cards and accounts.

27 The summary of all these details are clearly within the Complaint. Further, the
28 multitude of documents, which will be produced during discovery, will have exact details of the

1 time, amounts and date of occurrence of each event, how Frontiera obtained the signature
 2 stamps, how Frontiera took the money (and concealed it), is uniquely within the knowledge of
 3 Frontiera and therefore does not have to plead.¹⁰

4 What Frontiera calls bare assertions are actually facts.¹¹ And what Frontiera calls
 5 “additional bare assertions” are the details backing up the stated facts.¹² The Plaintiff would be
 6 hard pressed to be any more detailed unless it provided pictures of the documents within the
 7 body of the complaint, which is absurd. These are not legal conclusions, but actual facts (i.e.
 8 Frontiera actually took company money and used it to purchase a vehicle).

9 The other causes of action against Frontier, Unjust Enrichment (Fifth Cause of Action)
 10 and conversion/constructive trust (Sixth Cause of Action), are not fraud claims.

11 **c. Unjust Enrichment is a contractual claim based in quantum meruit.**

12 Essentially, a person cannot get a benefit without paying for it. The Nevada Supreme
 13 Court stated, “[t]hat is the state of our law, too. In *Thompson v. Herrmann*, 91 Nev. 63, 68, 530
 14 P.2d 1183, 1186 (1975), this court concluded that “[t]he basis of recovery on quantum meruit ...
 15 is that a party has received from another a benefit which is unjust for him to retain without
 16 paying for it.”¹³

17 Frontiera received the benefit of items he purchased using the Plaintiff’s money and
 18 accounts. He received value without paying for it. As a result, he was unjustly enriched. This
 19 is exactly what the complaint states.

20 **d. Constructive Trust Claim Stands on its own.**

21 Conversion/constructive trust is the act of exerting an inappropriate dominion on
 22 property that does not belong to the person who has it. “A constructive trust is a remedial
 23 device by which the holder of legal title to property is held to be a trustee of that property for
 24 the benefit of another who in good conscience is entitled to it.”¹⁴ In fact, in Nevada, fraud is not
 25 required to form a constructive trust. “We have stated, however, that constructive trust as a

26 ¹⁰ See, *Exergen Corp., Infra*.

27 ¹¹ Motion to Dismiss Complaint, Docket 18, Page 4:12-14

28 ¹² Id. Page 4:15-24

¹³ *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. Adv. Op. 35, 283 P.3d 250, 258 (2012)

1 remedy is not “limited to [fraud and] misconduct cases; it redresses unjust enrichment, not
2 wrongdoing.”¹⁵

3 In this case, Frontiera used funds that belonged to Count’s Kustoms to purchase
4 property, such as his vehicle, as well as other personal property in Frontiera’s possession. The
5 property should be held in trust for the Plaintiff, since it was their funds that were used to make
6 the purchases. This is exactly what it states in the cause of action.

7 **IV. ALTERNATIVELY, LEAVE TO AMEND**

8 If this court concludes that additional factual pleading is required, Plaintiff respectfully
9 requests leave to amend. Generally, leave to amend “should, as the rules require, be ‘freely
10 given.’”¹⁶

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26 ¹⁴ *Locken v. Locken*, 98 Nev. 369, 372, 650 P.2d 803, 804-5 (1982), quoting *Danning v. Lum's,*
27 *Inc.*, 86 Nev. 868, 871, 478 P.2d 166 (1970).”

28 ¹⁵ *Waldman v. Maini*, 124 Nev. 1121, 1130, 195 P.3d 850, 857 (2008) (cites omitted)

¹⁶ *Foman v. Davis*, 371 U.S. 178, 182 (1962)

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V. CONCLUSION

WHEREFORE, Plaintiff respectfully requests that Defendant's Motion to Dismiss be denied or, alternatively, to the extent this Court finds that Plaintiff's Complaint is still facially deficient, Plaintiff requests an opportunity to amend the pleading to cure any such deficiency after discovery.

DATED this 17th day of May, 2016.

BLACK & LOBELLO



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Nevada Bar No. 4000
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Attorneys for Plaintiff

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CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 17th day of May, 2016, I caused the above and foregoing document entitled **PLAINTIFF/COUNTERDEFENDANT, COUNT'S KUSTOMS, LLC,'S OPPOSITION TO DEFENDANT/CROSS-DEFENDANT JOSEPH FRONTIERA'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 9(b) and 12(b)(6)** to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and
- ☒ by electronic service through the Federal Court's ECF system;
- ☐ pursuant to EDCR 7.26, to be sent via facsimile;
- ☐ hand delivered

to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

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Attorneys for Defendant
Randstad Professionals US, LP dba Randstad
Professionals

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Las Vegas, NV 89128
Attorneys for Defendant
Joseph Frontiera

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

/s/ Shirley Blackburn
An Employee of Black & LoBello

EXHIBIT “5”

EXHIBIT “5”

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ERIC R. MCDONOUGH, ESQ.
(Pro Hac Vice Pending)
AMY A. ABELOFF, ESQ.
(Pro Hac Vice Accepted)
SEYFARTH SHAW LLP
2029 Century Park East, Ste. 3500
Los Angeles, California 90067
Telephone No.: 310-277-7200
Fax No.: 310-201-5219

Attorney for Defendant/Counterclaimant/Cross-Claimant,
Randstad Professionals US, LP

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

COUNT'S KUSTOMS, LLC, a Nevada
corporation,

Plaintiff,

vs.

JOSEPH FRONTIERA, an individual;
RANDSTAD PROFESSIONALS; US, LP a
Delaware limited partnership, d/b/a
RANDSTAD PROFESSIONALS; DOES I
through X, and DOE CORPORATIONS XI
through XX, inclusive,

Defendants.

RANDSTAD PROFESSIONALS US, LP,

Plaintiff-in-Counterclaim,

COUNT'S KUSTOMS, LLC,

CASE NO: 2:126-CV-00910-JAD-GWF

**DEFENDANT/COUNTERCLAIMANT
RANDSTAD PROFESSIONALS US,
LP's OPPOSITION TO
PLAINTIFF/COUNTERDEFENDANT
COUNT'S KUSTOMS, LLC'S
MOTION TO STRIKE
COUNTERCLAIM OR IN THE
ALTERNATIVE, MOTION TO
DISMISS, OR IN THE
ALTERNATIVE, MOTION TO
AMEND ANSWER**

DEFENDANT/COUNTERCLAIMANT RANDSTAD PROFESSIONALS US, LP's OPPOSITION TO
PLAINTIFF/COUNTERDEFENDANT COUNT'S KUSTOMS, LLC'S MOTION TO STRIKE COUNTERCLAIM
OR IN THE ALTERNATIVE, MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AMEND
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Defendant-in-Counterclaim.

RANDSTAD PROFESSIONALS US, LP,

Cross-Claimant,

JOSEPH FRONTIERA,

Cross-Defendant.

**DEFENDANT/COUNTERCLAIMANT RANDSTAD PROFESSIONALS US, LP's
OPPOSITION TO PLAINTIFF/COUNTERDEFENDANT COUNT'S KUSTOMS, LLC'S
MOTION TO STRIKE COUNTERCLAIM OR IN THE ALTERNATIVE, MOTION TO
DISMISS**

COMES NOW Defendant/Counterclaimant, Randstad Professionals US, LP ("Randstad"), by and through its counsel of record, Michael C. Mills, Esq., of the law firm of Bauman Loewe Witt & Maxwell, PLLC, and Eric R. McDonough, Esq. and Amy A. Abeloff, Esq., of the law firm of Seyfarth Shaw LLP, and files its Opposition to Plaintiff/Counterdefendant Count's Kustoms, LLC's ("CK") Motion to Strike Counterclaim or in the Alternative, Motion to Dismiss, or in the Alternative, Motion to Amend Answer. This opposition is made and based on the attached Memorandum of Points and Authorities, the Exhibits and declarations attached hereto, and all applicable papers and pleadings on file herein.

Dated this 19th day of May 2016.

BAUMAN LOEWE WITT & MAXWELL, PLLC



MICHAEL C. MILLS, ESQ.

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ERIC R. MCDONOUGH, ESQ.
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AMY A. ABELOFF, ESQ.

DEFENDANT/COUNTERCLAIMANT RANDSTAD PROFESSIONALS US, LP's OPPOSITION TO PLAINTIFF/COUNTERDEFENDANT COUNT'S KUSTOMS, LLC'S MOTION TO STRIKE COUNTERCLAIM OR IN THE ALTERNATIVE, MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AMEND ANSWER

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff/Counterdefendant Count's Kustoms, LLC ("CK") mischaracterizes this action as Defendant/Counterclaimant Randstad Professionals US, LP's ("Randstad") "failure to perform basic vetting of a[n employment] candidate." The real issue in this case is CK's failure to abide by its contractual obligations outlined in the Randstad Finance & Accounting Service Agreement (the "Agreement") with Randstad.¹

II. PROCEDURAL HISTORY

On March 22, 2016, CK filed a complaint in the Eighth Judicial District Court, Clark County, Nevada, entitled *Count's Kustoms, LLC v. Joseph A. Frontiera, Randstad Professionals US, LP*, Case No. A-16-733821-C. CK served said complaint on Randstad on March 28, 2016. The case was reassigned to Business Court, Case No. A-16-733821-B on April 18, 2016, and Randstad filed its answer, counterclaims, and cross-claims on April 18 as well. On April 21, 2016, Randstad filed a Notice of Removal with this Court, which as of April 22, 2016 has jurisdiction over this action. Unbeknownst to Randstad, on April 21, 2016, CK filed a Motion to Strike or in the Alternative, Motion to Dismiss Randstad's Counterclaim ("Motion to Strike") with the District Court, Clark County. Following removal of the action to federal district court, CK re-filed its Motion to Strike Counterclaim or in the Alternative, Motion to Dismiss on May 3, 2016.

III. FACTUAL ALLEGATIONS

Randstad is a limited partnership organized under the laws of the State of Delaware.² Count's Kustoms, LLC ("CK") is a Nevada limited liability corporation registered to do business

¹ See The Agreement, attached as Exhibit A hereto.

² See Defendant/Counterclaimant's Counterclaims ¶ 1.

DEFENDANT/COUNTERCLAIMANT RANDSTAD PROFESSIONALS US, LP'S OPPOSITION TO
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1 in the State of Nevada.³ On or around June 17, 2013, co-Defendant Joseph Frontiera
2 (“Frontiera”) was hired by Theo Spyer (“Spyer”), acting on behalf of CK in such hiring capacity,
3 to “serve as the General Manager to assist in the day to day operations, including but not limited
4 to... accounting...[and] collections.”⁴ Spyer/CK engaged Randstad’s services because CK was
5 searching for a Controller and a Staff Accountant.⁵ As part of its engagement with Spyer/CK,
6 Randstad provided Spyer/CK with its “Randstad Finance & Accounting Service Agreement” (the
7 “Agreement”), which outlined Randstad’s cost of services, definitions, payment terms,
8 guarantees, and client responsibility.⁶ Frontiera and CK signed the Agreement in connection
9 with Randstad’s providing of temporary staffing services to CK.⁷ In the Agreement, CK was
10 referred to as the “Client,” Randstad was referred to as “Randstad F&A,” and Frontiera was
11 referred to as the “Candidate.”⁸ By signing the Agreement, CK bound itself to the terms of the
12 Agreement.⁹ The terms of the Agreement included provisions explicating “Client
13 Responsibility.”¹⁰ The terms of the Agreement stated that as a client of Randstad, CK agreed
14 that all services provided by Frontiera would be performed under CK’s exclusive and qualified
15 direction, supervision, and control.¹¹ The terms of the Agreement stated that Randstad would
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17 ³ See Complaint ¶ 1; see also Defendant/Counterclaimant’s Counterclaims ¶ 2.

18 ⁴ Kaplan Decl. ¶¶ 16-17; Defendant/Counterclaimant’s Counterclaims ¶ 3; Complaint ¶ 5

19 ⁵ Defendant/Counterclaimant’s Counterclaims ¶ 4.

20 ⁶ *Id.* ¶ 5; see also Exhibit A.

21 ⁷ Defendant/Counterclaimant’s Counterclaims ¶ 6.

22 ⁸ *Id.* ¶ 7.

23 ⁹ *Id.* ¶ 8.

24 ¹⁰ *Id.* ¶ 9; see also Exhibit A.

25 ¹¹ Defendant/Counterclaimant’s Counterclaims ¶ 10; see also Exhibit A.

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1 have no responsibility for supervising or directing the work of a candidate, like Frontiera in the
2 case at bar.¹² The terms of the Agreement stated that CK agreed that it would not allow
3 candidates, like Frontiera, to handle cash or credit card transactions, have authority to transfer
4 funds, make payments or disburse funds, have access to check signing equipment or other
5 valuable property, take responsibility for tax deadlines, have access to trade secret information,
6 have a key to the office, take work, documents or equipment (including laptops) off-site, operate
7 client's leased or owned vehicles, travel without prior written permission from Randstad or
8 perform any other tasks or have any responsibility inconsistent with sound internal control
9 practices (emphasis added).¹³ The terms of the Agreement stated that candidates, like Frontiera,
10 were not allowed to sign any document on behalf of Randstad.¹⁴ The terms of the Agreement
11 stated that CK agreed that if it suspected or discovered any indication of impropriety by
12 Frontiera, that CK would notify Randstad immediately and in any case, no later than ten (10)
13 days from discovery.¹⁵ The terms of the Agreement also specified that Randstad conducts
14 reference checks for its own purposes.¹⁶ The terms of the Agreement stated that Randstad would
15 make reasonable inquiries to verify the accuracy of information forwarded on a candidate, like
16 Frontiera, but did not guarantee the accuracy of such information.¹⁷ The terms of the Agreement
17 further stated that in evaluating candidates for direct hire, CK should thoroughly check
18 Randstad's candidates with the same rigor as if it were hiring candidates directly, as Randstad

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20 ¹² Defendant/Counterclaimant's Counterclaims ¶ 11; *see also* Exhibit A.

21 ¹³ Defendant/Counterclaimant's Counterclaims ¶ 12; *see also* Exhibit A.

22 ¹⁴ Defendant/Counterclaimant's Counterclaims ¶ 13; *see also* Exhibit A.

23 ¹⁵ Defendant/Counterclaimant's Counterclaims ¶ 14; *see also* Exhibit A.

24 ¹⁶ Defendant/Counterclaimant's Counterclaims ¶ 15; *see also* Exhibit A.

25 ¹⁷ Defendant/Counterclaimant's Counterclaims ¶ 16; *see also* Exhibit A.

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1 “does not conduct background, criminal or credit checks unless the client requests this service
 2 in writing, and pays the fees for such outside services” (emphasis added).¹⁸ Never did CK
 3 request that Randstad conduct background, criminal or credit checks on Frontiera in writing, nor
 4 did CK pay any fee(s) for such outside services as related to Frontiera.¹⁹ The terms of the
 5 Agreement further stated that CK would “defend and indemnify Randstad, its parent,
 6 subsidiaries, directors, officers, agents, representatives and employees for all claims, losses, and
 7 liability (including reasonable attorneys’ fees) caused by CK’s breach of the Agreement, its
 8 failure to discharge its duties and responsibilities set forth under the Client Responsibility
 9 Section [therein] or in the negligence, gross negligence or willful misconduct of itself (CK),
 10 its officers, employees or authorized agents in the discharge of those duties and
 11 responsibilities” (emphasis added).²⁰ The Agreement in whole was valid, enforceable, and
 12 entered into between Randstad and CK for work to be performed by Frontiera.²¹ Randstad
 13 performed all conditions, covenants, and promises required by it to be performed in accordance
 14 with the Agreement, including the performance of reference checks for its own purposes, and
 15 verification of the accuracy of such information.²²

16 However, “Frontiera was added as a signer to the accounts at Count’s Kustoms.”²³
 17 Frontiera had access to and power to disperse CK’s monies, as evidenced in part by his failure to
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19 ¹⁸ Defendant/Counterclaimant’s Counterclaims ¶ 17; *see also* Exhibit A.

20 ¹⁹ Defendant/Counterclaimant’s Counterclaims ¶ 18.

21 ²⁰ Defendant/Counterclaimant’s Counterclaims ¶ 19; *see also* Exhibit A.

22 ²¹ Defendant/Counterclaimant’s Counterclaims ¶ 20.

23 ²² *Id.* ¶ 21.

24 ²³ *See* Complaint ¶ 11.

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1 cause fourth quarter 2013 payroll taxes to be timely paid, his failure to pay the Nevada State
2 Department of Taxation timely, and failure to pay the Live Entertainment Tax and Sales & Use
3 tax.²⁴ As such, Frontiera's day-to-day operations, namely, accounting and collections, being a
4 signer to accounts at a business, and being charged with paying payroll taxes involved the
5 handling of cash or credit card transactions, having authority to transfer funds, making payments
6 or disbursing funds, having access to check signing equipment or other valuable property, and
7 taking responsibility for tax deadlines; all of which were expressly disclaimed in the Agreement
8 as types of actions over which CK assumes full responsibility for claims arising therefrom.²⁵

9 **IV. GENERAL ALLEGATIONS ASSERTED IN COUNT'S KUSTOMS MOTION TO STRIKE**

10 CK alleges in its Motion to Strike that Randstad's counterclaims are mere affirmative
11 defenses and on said basis, should be stricken, dismissed, or treated as affirmative defenses,
12 "such that the answer is either reformed or refiled." CK also maintains that Randstad is unable
13 to recover its attorney's fees in this matter.

14 Randstad disagrees with CK's sweeping characterization that all of its counterclaims are
15 "disguised" as affirmative defenses and that it is not entitled to attorney's fees, and on such
16 belief files the instant Opposition and Memorandum in support thereof. In the alternative,
17 Randstad seeks leave to amend its Answer to CK's Complaint.

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23 ²⁴ See Complaint ¶¶ 15, 16, 17, 18, 19.

24 ²⁵ See Exhibit A.

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V. ARGUMENT

A. Randstad is Entitled to Recover its Attorney's Fees

1. Nevada Law Allows for the Recovery of Attorney's Fees When an Agreement Provides for the Award Thereof

Under Nevada law, each party to a proceeding typically bears its own costs for attorney's fees, pursuant to what is known as the "American Rule."²⁶ However, federal courts may award attorney's fees "if there is a valid contract that provides for the award."²⁷ Nevada law allows courts to enforce the recovery of litigation damages in the form of attorney's fees if an agreement contemplates such recovery.²⁸

CK entered into the Agreement with Randstad, which specifically states that CK shall be responsible for the recovery of attorney's fees "*caused by [CK's] breach of the Agreement, its failure to discharge its duties and responsibilities set forth under the Client Responsibility Section [therein] or in the negligence, gross negligence or willful misconduct of [itself (CK)], its officers, employees or authorized agents in the discharge of those duties and responsibilities.*"²⁹ Contrary to CK's nonsensical assertions related to Randstad's seeking of attorney's fees, Randstad and CK have a valid, enforceable agreement which specifically states

²⁶ Tracey v. Am. Family Mut. Ins. Co., No. 2:09-CV-1257-GMN-PAL, 2010 WL 5477751, at *1 (D. Nev. Dec. 30, 2010) (citing Hensley v. Eckerhart, 461 U.S. 424, 429 103 S.Ct. 1933, 1937 (1983)).

²⁷ Id.

²⁸ See Massachusetts Mut. Ins. Co. v. Wenzl, No. 2:10-CV-01565-RLH, 2012 WL 48416, at *1 (D. Nev. Jan. 9, 2012) (holding that plaintiff was entitled to attorney's fees because the contract on which the case rested between the parties "included a provision allowing for an award of attorney's fees"); Speed Techs., LLC v. Bully Dog Sales & Distribution, LLC, No. 03:11-CV-00180-LRH, 2011 WL 6812858, at *2 (D. Nev. Dec. 27, 2011) (quoting: "In Nevada, a party is not entitled to attorney's fees unless a statute or contract provides otherwise" (emphasis added) (citations omitted)); W. Oilfields Supply Co. v. Goodwin, No. 2:09-CV-00286-RLH-LR, 2010 WL 3896123, at *2 (D. Nev. Sept. 29, 2010) (citing exceptions to the "American Rule," which states that parties generally assume the burden of paying their attorney's fees, except in certain circumstances, such as when "parties agree by contract to permit recovery of attorney's fees," in which case "a federal court will enforce that contract according to its terms").

²⁹ See Exhibit A (emphasis added).

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1 Randstad can recoup attorney's fees from CK. CK failed to properly perform its duties under the
2 Client Responsibility provision in the Agreement with Randstad when it allowed Frontiera to
3 handle cash, gave him authority to transfer funds, make payments, or disburse funds, have access
4 to check signing equipment or other valuable property, and take responsibility for tax
5 deadlines.³⁰ Although such tasks are expressly disclaimed in the Client Responsibility section of
6 the Agreement, CK permitted Frontiera to perform those tasks, amounting to CK's failure to
7 discharge its duties and responsibilities as set forth under the Client Responsibility Section of the
8 Agreement. Thus, CK is required to pay Randstad's attorney's fees in this action pursuant to the
9 Agreement.

10 Moreover, CK asserts that Randstad is arguing that CK "is in breach of contract because
11 they [sic] filed a breach of contract claim against Randstad"³¹ and that somehow, based on such a
12 notion, Randstad is not entitled to its attorney's fees. However, CK's unsupported assertion
13 misconstrues (and blatantly ignores) Randstad's clear argument that CK failed to perform its
14 duties under the Client Responsibility section of the Agreement, and as a result, has itself created
15 and filed a cause of action in which it is contractually obligated to pay Randstad's attorney's
16 fees. CK's arguments in the Motion to Strike are wholly inapposite, and amount to nothing more
17 than an attempt to skirt its responsibility to pay Randstad's attorney's fees in certain proceedings
18 like that which currently faces this Court. The Court should enforce the Agreement and find that
19 Randstad is entitled to recover its attorney's fees as costs.

20 **2. Alternatively, Randstad May Claim Attorney's Fees as Special**
21 **Damages If Properly Plead and Proved**

22 In the alternative, Randstad is entitled to its attorney's fees as special damages. Under
23 Nevada law, "when a party claims it has incurred attorney fees as foreseeable damages arising

24 ³⁰ See Defendant/Counterclaimant's Counterclaims ¶¶ 22-32.

25 ³¹ See Motion to Strike 4:13-15.

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1 from tortious conduct or a breach of contract, such fees are considered special damages.”³² A
2 party seeking to collect attorney’s fees as special damages must specially plead such damages,
3 prove such damages are a “natural and proximate consequence of the injurious conduct,” and
4 prove the fees as to each claim.³³ The mere mention of attorney’s fees in a party’s prayer for
5 relief is insufficient to meet this requirement.³⁴

6 Randstad has specifically plead CK’s liability for Randstad’s attorney’s fees for CK’s
7 failure to discharge its duties pursuant to the Client Responsibility section of the Agreement, at
8 least with regard to its second counterclaim.³⁵ Nevada precedent does not bar an award of
9 attorney fees in the event such special damages are not plead as to every claim. So long as
10 evidence of attorney fees as special damages is litigated at some point during trial, Randstad will
11 be able to recoup such fees from CK as special damages.³⁶

12 Randstad is also able to demonstrate that its attorney’s fees are special damages
13 amounting to the “natural and proximate consequence of [CK’s] injurious conduct” because CK
14 brought this action against Randstad after failing to properly perform its obligations under the
15 Client Responsibility section of the Agreement. If CK was not personally negligent in carrying
16 out its business, let alone its contractual duties to Randstad, it likely would not have brought the
17 instant action. Further, Randstad will be able to prove the amount of attorney’s fees as to each
18 claim.

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21 ³² *Sandy Valley Associates v. Sky Ranch Estates Owners Ass’n*, 35 P.3d 964, 969 (2001).

22 ³³ *Id.*

23 ³⁴ *Id.*

24 ³⁵ See Defendant/Counterclaimant’s Counterclaims ¶ 37.

25 ³⁶ See *Sandy Valley*, 35 P.3d at 971.

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1 It would be an abuse of discretion if this Court granted CK's Motion to Strike or in the
2 Alternative, Motion to Dismiss at this stage of the proceeding based on CK's unsupported,
3 untried allegations that no attorney's fees are available to Randstad. Nevada case precedent
4 specifically requires that "attorney fees must be *pleaded as special damages and need to be*
5 *litigated at trial*"³⁷ (emphasis added). In other words, the availability of attorney's fees to one
6 party is not to be settled at the pleadings stage of a proceeding. Thus, CK's Motion to Strike
7 should be denied.

8 **B. Randstad's Counterclaims Are Actionable As Counterclaims and Not**
9 **Disguised as Affirmative Defenses**

10 CK asserts that all of Randstad's counterclaims are "disguised affirmative defenses"³⁸
11 and thus do not state claims upon which relief can be granted or must be stricken. Once again,
12 CK ignores the fact that Randstad is entitled to recover its attorney's fees, which it has
13 specifically requested in its Answer and Counterclaims, and such fees will provide appropriate
14 relief for the harm it has and continues to suffer as a result of this pending litigation.

15 Though Federal Rule of Civil Procedure 12(f) allows a court to strike "from a pleading an
16 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," CK has
17 not adequately asserted that Randstad's counterclaims deserve to be stricken. CK has only made
18 unsupported, conclusory statements regarding Randstad's counterclaims against it. As such,
19 Randstad's counterclaims should not be stricken.

20 Federal Rule of Civil Procedure 12(b)(6) provides that a party can assert a "failure to
21 state a claim upon which relief can be granted" by motion. Yet again, CK ignores the legal

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23 ³⁷ *Tracey v. Am. Family Mut. Ins. Co.*, No. 2:09-CV-1257-GMN-PAL, 2010 WL 5477751, at *6 (D. Nev. Dec. 30, 2010).

24 ³⁸ See Motion to Strike 6:4.

1 standard this court applies in considering a motion to dismiss. First, the court “must presume all
2 well-pleaded allegations of material fact and must draw all reasonable inferences in favor of the
3 non-moving party.”³⁹ The court is not required to accept as true a party’s conclusory statements,
4 factual deductions, or other unreasonable inferences.⁴⁰ This court also strongly presumes against
5 dismissing an action for failure to state a claim.⁴¹ The issue in deciding a motion to dismiss is
6 “not whether Plaintiff will ultimately prevail, but whether [it] may offer evidence in support of
7 [its] claims.”⁴² Thus, this court cannot grant a motion to dismiss for failure to state a claim
8 “unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of [its]
9 claim which would entitle [it] to relief.”⁴³

10 CK brings its Motion to Strike or in the alternative, Motion to Dismiss in yet another
11 attempt to shirk its responsibilities pursuant to the Agreement with Randstad. To illustrate, CK
12 asserts that Randstad’s counterclaims are “retaliatory, vexatious, unnecessary and designed
13 simply to intimidate [CK] and cause unnecessary expense,”⁴⁴ which is particularly ironic given
14 the nature of CK’s own claims. CK has acted in blatant disregard of its past and continuing
15 obligations to Randstad pursuant to the Agreement as described above. CK further attempts to
16 avoid its responsibilities by asserting that the Agreement is “not the original agreement entered
17 into by the parties,” but fails to provide any other document in its place. CK runs further away
18 from its responsibilities by claiming that “Randstad is attempting to rewrite the agreement in fine

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20 ³⁹ *Cardinale v. La Petite Acad., Inc.*, 207 F. Supp. 2d 1158, 1159 (D. Nev. 2002) (citations omitted).

21 ⁴⁰ *Id.* (citations omitted).

22 ⁴¹ *Id.* (citations omitted).

23 ⁴² *Id.* (citations omitted).

24 ⁴³ *Id.* (citations omitted).

25 ⁴⁴ *See* Motion to Strike 4:11-12.

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1 print on an hours report to take back the very reason for [Frontiera's] employment and the
2 specific job functions that a controller would conduct,"⁴⁵ despite clear evidence that an agent of
3 CK was presented with and signed the Agreement well before the instigation of this
4 proceeding.⁴⁶ None of CK's assertions are based on any known fact, nor are they rebutted by
5 any affidavit, declaration, or other information pertinent at this stage of the proceeding. To the
6 extent CK attempts to bolster its assertions, it nevertheless fails in so doing. CK only proffers a
7 screen shot of Randstad's website describing the vetting process of its candidates. Ironically,
8 *nowhere on the screen shot of Randstad's website does Randstad promise, assert, or otherwise*
9 *indicate that it performs criminal or other background checks of the type about which CK*
10 *complains were not performed on Frontiera.* Once again, CK fails to acknowledge the
11 Agreement's provisions, which state that Randstad "*does not* conduct background, criminal or
12 credit checks *unless the client requests this service in writing, and pays the fees for such*
13 *outside services.*"⁴⁷ CK never requested such checks in writing and never paid the requisite fees
14 for such service.⁴⁸ Perhaps most importantly, none of CK's bare assertions combats the fact that
15 Randstad is entitled to countersue CK for its attorney's fees based on its failure to appropriately
16 perform its duties under the Agreement. CK's groundless motion to strike or in the alternative,
17 to dismiss Randstad's counterclaims should be denied, as Randstad's counterclaims clearly state
18 claims that are not duplicitous, and upon which relief (in the form of attorney's fees) may be
19 granted.

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21 ⁴⁵ See *id.* 5:8-12.

22 ⁴⁶ See Exhibit A.

23 ⁴⁷ See *id.* at "Client Responsibility".

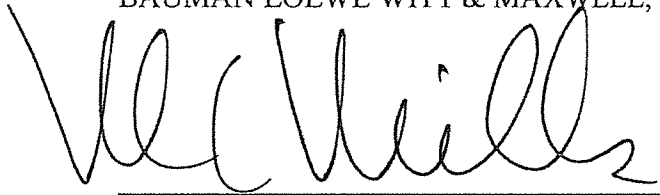
24 ⁴⁸ Kaplan Decl. ¶ 20.

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1 Answer. Randstad attaches hereto its Proposed Amended Answer and Proposed Order as Exhibit
2 B and Exhibit C hereto.

3 Dated this 19th day of May 2016.

4 BAUMAN LOEWE WITT & MAXWELL, PLLC

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6
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CERTIFICATE OF SERVICE

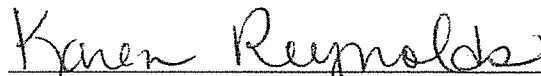
Pursuant to Fed. R. Civ. P. 5, I certify that I am an employee of BAUMAN LOEWE WITT & MAXWELL, PLLC., and that on this 19th day of May 2016, I served the foregoing DEFENDANT/COUNTERCLAIMANT RANDSTAD PROFESSIONALS US, LP'S OPPOSITION TO PLAINTIFF/COUNTERDEFENDANT COUNT'S KUSTOMS, LLC'S MOTION TO STRIKE COUNTERCLAIM OR IN THE ALTERNATIVE, MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AMEND ANSWER as stated in the SERVICE LIST below:

- ☒ VIA CM/ECF Filing was made upon the following counsel by e-filing with the Court's CM/ECF system.
- ☐ VIA U.S. POSTAL MAIL: by placing a true and correct copy thereof enclosed in a sealed envelope with the postage thereon fully prepaid, addressed as indicated on the attached service list in the United States Mail.
- ☐ VIA FACSIMILE: by causing a true and correct copy thereof to be faxed on this date to the addressee(s) at the attached facsimile numbers set forth in the service list.
- ☐ VIA PERSONAL DELIVERY: by causing a true and correct copy thereof to be hand-delivered to the address(s) at the attached addresses set forth in the service list.

SERVICE LIST

Theresa Mains, Esq.
2251 N. Rampart Boulevard, Suite 102
Las Vegas, NV 89128
Telephone: (702) 684-6163
Facsimile: (702) 684-6743
Attorneys for Defendant/Cross-Defendant
James Frontiera

Steven Mack, Esq.
Black & Lobello
10777 W. Twain Avenue, 3rd Floor
Las Vegas, NV 89135
Telephone: (702) 869-8801
Facsimile: (702) 869-2269
Email: smack@blacklobellowlaw.com
Attorney for Count's Kustoms, LLC


An Employee of BAUMAN LOEWE WITT
& MAXWELL, PLLC.

DEFENDANT/COUNTERCLAIMANT RANDSTAD PROFESSIONALS US, LP's OPPOSITION TO
PLAINTIFF/COUNTERDEFENDANT COUNT'S KUSTOMS, LLC'S MOTION TO STRIKE COUNTERCLAIM
OR IN THE ALTERNATIVE, MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AMEND
ANSWER

EXHIBIT "A"

o

EXHIBIT "A"

RANDSTAD FINANCE & ACCOUNTING SERVICE AGREEMENT

Thank you for choosing Randstad Finance & Accounting to assist with your staffing needs. Outlined below are the parameters of our agreement with you. If you have any questions, please contact your local Randstad F&A representative for assistance.

Cost of Services

Direct Hire - Randstad F&A's fees are on a contingency basis. The detailed search required to match a client with a candidate is conducted at no charge. Your acceptance of our referral of a candidate constitutes your acceptance of this schedule of fees and these terms and conditions unless modified in writing and signed by us. The fee is charged when the search is complete and you accept the candidate for hire. Direct hire fees are based on one percent (1%) per thousand dollars of the full-time annual compensation, to a maximum fee of thirty percent (30%). For example, the fee on an annual compensation of \$30,000 plus a bonus of \$10,000 would be 30% of \$50,000, or \$15,000. Fees are calculated on a full-time basis.

Project - Randstad F&A's rates are based on a number of factors which include: specific skill needs, job description, responsibilities, length of project, availability of candidates and demographics. The bill rate includes applicable payroll charges such as social security, federal, state and local withholding taxes, workers' compensation insurance, unemployment taxes and state disability insurance, if applicable. The total hours billed to you are based on a weekly timesheet signed by you at the end of each week and at the end of the project. In signing, you agree with the provisions stated. Candidates working on a project will be paid overtime as required by state and federal wage and hour laws and billed accordingly.

Conversion - The person assigned to a project is an employee of Randstad F&A. Should you wish to convert this person to your employ, you agree to pay a conversion fee equal to one percent (1%) per thousand dollars of total full-time annual compensation to a maximum of thirty percent (30%).

Your organization is responsible for direct hire and/or conversion fees should you hire a Randstad F&A candidate, regardless of employment classification, for all candidates hired within one (1) year from the date of referral or the end of the project. You also agree to pay a fee should our candidate be hired by a subsidiary or other related company under your common control, or by another company to whom you have referred our candidate, including any staffing services.

Payment Terms

Invoices are due and payable upon receipt. All invoices over 30 days old are subject to a finance charge of one and one-half percent (1 1/2%) per month on the unpaid balance. We may request credit information before working on a project or direct hire position. This information is held strictly confidential.

Guarantees

Direct Hire - Randstad F&A provides an unconditional, one hundred (100) day replacement guarantee on any of our candidates you hire. Should the candidate voluntarily leave or be terminated for any reason other than in connection with a reduction in workforce, lack of work or other reason unrelated to referred candidate's performance during the one hundred (100) days following the start date, we will replace that candidate at no charge. This replacement must occur within six (6) months from the date of notification.

Conversion from Project to Direct Hire - When a candidate working on a project converts to direct hire status, the above direct hire replacement guarantee applies. The date our employee started the project is the date used as the beginning of the one hundred (100) days.

These replacement guarantees apply only if the full fee is paid within ten (10) days of the start date of the candidate and Randstad F&A is notified of the situation within the one hundred (100) days.

Project - If you are dissatisfied for any reason with the candidate assigned to you and you notify Randstad F&A during the first day of the assignment, you will not be charged for the first eight (8) hours worked.

Client Responsibility

As a client of Randstad F&A, you agree that all services provided by our candidate will be performed under your exclusive and qualified direction, supervision and control. Randstad F&A will have no responsibility for supervising or directing the work of a candidate. Client agrees that it will not allow candidates to handle cash or credit card transactions, have authority to transfer funds, make payments or disburse funds, have access to check signing equipment or other valuable property, take responsibility for tax deadlines, have access to trade secret information, have a key to the office, take work documents or equipment (including laptop) off-site, operate client's leased or owned vehicles, travel without prior written permission from Randstad F&A or perform any other tasks or have any responsibility inconsistent with sound internal control practices. Candidates are not allowed to sign any document on behalf of Randstad F&A. Candidates are not permitted to render any written legal or accounting opinion, or any opinion or certification that requires a signature, stamp or seal of a licensed professional. Client acknowledges that Randstad F&A provides staffing services, is not a public accounting firm and that it has all necessary internal accounting controls in place. Client agrees that if it suspects or discovers any indication of impropriety by candidate, client will notify Randstad F&A immediately and in any case, no later than ten (10) days from discovery.

Client acknowledges that if it has previously received a candidate's name and/or resume from another source, client shall so notify Randstad F&A in writing within twenty-four hours. If the notification is not received, such candidate will be considered to be represented by Randstad F&A.

Client acknowledges that it is in compliance with all applicable laws, including Equal Employment Opportunity, health and safety regulations. Randstad F&A conducts reference checks for its own purposes. We will make reasonable inquiries to verify the accuracy of information forwarded on a candidate, but does not guarantee its accuracy. In evaluating candidates for direct hire, client should thoroughly check Randstad F&A candidates with the same rigor as if it were hiring candidates directly. Randstad F&A does not conduct background, criminal or credit checks unless the client requests this service in writing, and pays the fees for such outside services.

To the extent permitted by law, the client will defend and indemnify Randstad F&A, its parent, subsidiaries, directors, officers, agents, representatives and employees for all claims, losses, and liability (including reasonable attorneys' fees) caused by the client's breach of the Agreement, its failure to discharge its duties and responsibilities set forth under the Client Responsibility section herein or the negligence, gross negligence or willful misconduct of the client, its officers, employees or authorized agents in the discharge of those duties and responsibilities.

Randstad F&A will make every reasonable effort to resolve any problems that arise during our services. In the event legal action is instituted by either party to enforce any part of this Agreement, the prevailing party will be entitled to all reasonable attorneys' fees and other legal costs incurred in such actions. In no event shall either party be liable to the other party for indirect, special or consequential or punitive damages. This is the entire agreement between the parties and supercedes all previous written or oral agreements. Your acceptance of resume(s), referral or candidates from Randstad F&A constitutes your acceptance of this Service Agreement.

Thank you for choosing Randstad Finance & Accounting to assist with your staffing needs.

USE BACKSIDE FOR EMPLOYEE DATA

EMPLOYEE DATA	
LAST NAME	FACONDA
FIRST NAME	JOE
XXX - XX - 5979	
LAST FOUR DIGITS OF SOCIAL SECURITY #	
EMPLOYEE SIGNATURE	
I CERTIFY THAT THE DATA SHOWN ON THIS TIMESHEET ARE CORRECT, THAT I HAVE BEEN ADVISED OF THE COMPANY'S POLICY AND THAT I HAVE AGREED TO THE CONDITIONS OF THIS ASSIGNMENT.	
THANK YOU	

CLIENT DATA	
COMPANY NAME	COUNTS KUSTOMS
ADDRESS	2710 HIGHWAYS
CITY	LAS VEGAS
STATE	NV
ZIP	89111
DATE	6/1/13
I CERTIFY THAT THE DATA SHOWN ON THIS TIMESHEET ARE CORRECT, THAT I HAVE BEEN ADVISED OF THE COMPANY'S POLICY AND THAT I HAVE AGREED TO THE CONDITIONS OF THIS ASSIGNMENT.	
THANK YOU	

PAY TIME CARD											
PLEASE FAX TO YOUR RANDSTAD F&A BRANCH				BRANCH NAME		MO		DAY		YR	
300/597				16		30		13			
THIS MUST BE COMPLETED TO PROCEED TO TIMECARD				WEEK ENDING SUNDAY							
Day	Date	Start Time	Lunch Out	Lunch In	Finish Time	Regular Time	Overtime	Overtime Rate			
		Hrs	Minutes	Hrs	Minutes	Hrs	Minutes	Hrs	Minutes	Hrs	Minutes
Mon	6/24	8:00			4:00	8:00					
Tue	6/25	8:00			4:00	8:00					
Wed	6/26	8:00			4:00	8:00					
Thu	6/27	8:00			4:00	8:00					
Fri	6/28	8:00			4:00	8:00					
Sat											
Sun											
Please Print Only (Add to the Timesheet)						TOTALS		40:00			
Additional Expenses (if any)						Randstad finance & accounting					

EXHIBIT “B”

EXHIBIT “B”

1 MICHAEL C. MILLS, ESQ.
Nevada Bar No. 003534
2 BAUMAN LOEWE WITT & MAXWELL, PLLC
3650 N. Rancho Dr., Ste. 114
3 Las Vegas, Nevada 89130
Telephone No.: 702-240-6060
4 Fax No.: 702-240-4267

5 ERIC R. MCDONOUGH, ESQ.
(Pro Hac Vice Pending)
6 AMY A. ABELOFF, ESQ.
(Pro Hac Vice Accepted)
7 SEYFARTH SHAW LLP
2029 Century Park East, Ste. 3500
8 Los Angeles, California 90067
Telephone No.: 310-277-7200
9 Fax No.: 310-201-5219

10 Attorney for Defendant/Cross-Claimant,
11 Randstad Professionals US, LP

12 UNITED STATES DISTRICT COURT
13 DISTRICT OF NEVADA

14 COUNT'S KUSTOMS, LLC, a Nevada
15 corporation,

16 Plaintiff,

17 vs.

18 JOSEPH FRONTIERA, an individual;
RANDSTAD PROFESSIONALS; US, LP a
19 Delaware limited partnership, d/b/a
RANDSTAD PROFESSIONALS; DOES I
20 through X, and DOE CORPORATIONS XI
through XX, inclusive,

21 Defendants.

22 RANDSTAD PROFESSIONALS US, LP,

23 Cross-Claimant,

24 JOSEPH FRONTIERA,

25 Cross-Defendant.
26

CASE NO: 2:126-CV-00910-JAD-GWF

**DEFENDANT/CROSS-CLAIMANT
RANDSTAD PROFESSIONALS US,
LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST
CROSS-DEFENDANT JOSEPH
FRONTIERA**

27
28 DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

**DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST
AMENDED ANSWER AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT
JOSEPH FRONTIERA**

COMES NOW Defendant/Cross-Claimant, Randstad Professionals US, LP ("Randstad"), by and through its counsel of record, Michael C. Mills, Esq., of the law firm of Bauman Loewe Witt & Maxwell, PLLC, and Eric R. McDonough, Esq. and Amy A. Abeloff, Esq., of the law firm of Seyfarth Shaw LLP, and files its First Amended Answer to Complaint and Cross-Claims Against Cross-Defendant Joseph Frontiera ("Frontiera") as follows:

GENERAL ALLEGATIONS

1. Answering Paragraph 1 of Plaintiff's Complaint, this answering Defendant, Randstad admits the allegations contained therein.

2. Answering Paragraph 2 of Plaintiff's Complaint, this answering Defendant Randstad is without sufficient information upon which to base a belief as to the truth or falsity of the allegations contained therein and upon said ground denies the same, and avers that Frontiera resided in the State of Nevada at the time of his employ with Plaintiff.

3. Answering Paragraph 3 of Plaintiff's Complaint, this answering Defendant Randstad denies the allegations contained therein, and avers that Defendant Randstad is a limited partnership organized under the laws of the State of Delaware.

4. Answering Paragraph 4 of Plaintiff's Complaint, this answering Defendant Randstad denies the allegations contained therein.

5. Answering Paragraph 5 of Plaintiff's Complaint, this answering Defendant Randstad denies the allegations contained therein, and avers that on or around June 17, 2013, Frontiera was hired by CK through the use of Randstad's services to serve as Controller on a temporary basis.

6. Answering Paragraph 6 of Plaintiff's Complaint, this answering Defendant Randstad is without sufficient information upon which to base a belief as to the truth or falsity of the allegations contained therein and upon said ground denies the same.

7. Answering Paragraph 7 of Plaintiff's Complaint, this answering Defendant

DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

1 Randstad denies the allegations contained therein, except admits that CK paid to Randstad a fee,
2 and avers that such fee was to compensate Randstad for services rendered to CK as described in
3 the Randstad Finance & Accounting Service Agreement (the "Agreement") that Randstad
4 prepared for CK's and Frontiera's signature.

5 8. Answering Paragraph 8 of Plaintiff's Complaint, this answering Defendant
6 Randstad is without sufficient information upon which to base a belief as to the truth or falsity of
7 the allegations contained therein as the substance of Paragraph 8 does not clearly designate to
8 which of Frontiera's positions at CK Plaintiff refers, and upon said ground denies the same.

9 9. Answering Paragraph 9 of Plaintiff's Complaint, this answering Defendant
10 Randstad is without sufficient information upon which to base a belief as to the truth or falsity of
11 the allegations contained therein as the substance of Paragraph 9 does not clearly designate to
12 which of Frontiera's positions at CK Plaintiff refers and upon said ground denies the same, and
13 avers that the Agreement describes the rights, expectations and obligations of all signatories.

14 10. Answering Paragraph 10 of Plaintiff's Complaint, this answering Defendant
15 Randstad denies the allegations contained therein.

16 11. Answering Paragraph 11 of Plaintiff's Complaint, this answering Defendant
17 Randstad is without sufficient information upon which to base a belief as to the truth or falsity of
18 the allegations contained therein and upon said ground denies the same.

19 12. Answering Paragraph 12 of Plaintiff's Complaint, this answering Defendant
20 Randstad is without sufficient information upon which to base a belief as to the truth or falsity of
21 the allegations contained therein as the substance of Paragraph 12 does not clearly designate to
22 which of Frontiera's positions at CK Plaintiff refers, and upon said ground denies the same.

23 13. Answering Paragraph 13 of Plaintiff's Complaint, this answering Defendant
24 Randstad is without sufficient information upon which to base a belief as to the truth or falsity of
25 the allegations contained therein and upon said ground denies the same.

26 14. Answering Paragraph 14 of Plaintiff's Complaint, this answering Defendant
27 Randstad is without sufficient information upon which to base a belief as to the truth or falsity of
28 DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

1 the allegations contained therein and upon said ground denies the same.

2 15. Answering Paragraph 15 of Plaintiff's Complaint, this answering Defendant
3 Randstad is without sufficient information upon which to base a belief as to the truth or falsity of
4 the allegations contained therein and upon said ground denies the same.

5 16. Answering Paragraph 16 of Plaintiff's Complaint, this answering Defendant
6 Randstad is without sufficient information upon which to base a belief as to the truth or falsity of
7 the allegations contained therein and upon said ground denies the same.

8 17. Answering Paragraph 17 of Plaintiff's Complaint, this answering Defendant
9 Randstad is without sufficient information upon which to base a belief as to the truth or falsity of
10 the allegations contained therein and upon said ground denies the same.

11 18. Answering Paragraph 18 of Plaintiff's Complaint, this answering Defendant
12 Randstad is without sufficient information upon which to base a belief as to the truth or falsity of
13 the allegations contained therein and upon said ground denies the same.

14 19. Answering Paragraph 19 of Plaintiff's Complaint, this answering Defendant
15 Randstad is without sufficient information upon which to base a belief as to the truth or falsity of
16 the allegations contained therein and upon said ground denies the same.

17 **FIRST CLAIM FOR RELIEF**

18 **(Breach of Contract)**

19 **(Randstad)**

20 20. Answering mislabeled Paragraph 17 of Plaintiff's Complaint, this answering
21 Defendant Randstad repeats and re-alleges his answers as set forth in Paragraphs 1 through 19
22 above with the same force and effect as though fully set forth herein.

23 21. Answering mislabeled Paragraph 18 of Plaintiff's Complaint, this answering
24 Defendant Randstad denies the allegations contained herein, and avers that on or around June 17,
25 2013, Frontiera was hired by CK through the use of Randstad's services to serve as Controller on
26 a temporary basis.

27 22. Answering mislabeled Paragraph 19 of Plaintiff's Complaint, this answering
28 DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

1 Defendant Randstad is without sufficient information upon which to base a belief as to the truth
2 or falsity of the allegations contained therein and upon said ground denies the same.

3 23. Answering mislabeled Paragraph 20 of Plaintiff's Complaint, this answering
4 Defendant Randstad denies the allegations contained therein, except admits that, per the terms
5 and conditions outlined in the Agreement, Randstad conducted its own reference checks on
6 Frontiera and took reasonable steps to verify the accuracy of such, and avers that it performed
7 the contracted services described in the Agreement.

8 24. Answering mislabeled Paragraph 21 of Plaintiff's Complaint, this answering
9 Defendant Randstad denies the allegations contained herein, and avers that Randstad performed
10 the contracted services described in the Agreement.

11 25. Mislabeled Paragraph 22 of Plaintiff's Complaint calls for a legal conclusion to
12 which no answer is required, and to the extent it is, this answering Defendant Randstad denies
13 the same.

14 26. Answering mislabeled Paragraph 23 of Plaintiff's Complaint, this answering
15 Defendant Randstad is without sufficient information upon which to base a belief as to whether
16 the retention of Black & LoBello's services were necessary, and upon said ground denies the
17 same, and every other assertion set forth therein.

18 **SECOND CLAIM FOR RELIEF**

19 **(Breach of Covenant of Good Faith & Fair Dealing)**

20 **(Randstad)**

21 27. Answering mislabeled Paragraph 24 of Plaintiff's Complaint, this answering
22 Defendant Randstad repeats and re-alleges his answers as set forth in Paragraphs 1 through 26
23 above with the same force and effect as though fully set forth herein.

24 28. Mislabeled Paragraph 25 of Plaintiff's Complaint calls for a legal conclusion to
25 which no answer is required, and to the extent it is, this answering Defendant Randstad denies
26 the same.

27 29. Answering mislabeled Paragraph 26 of Plaintiff's Complaint, this answering
28 DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

1 Defendant Randstad denies the allegations contained therein.

2 30. Answering mislabeled Paragraph 27 of Plaintiff's Complaint, this answering
3 Defendant Randstad denies the allegations contained therein.

4 31. Mislabeled Paragraph 28 of Plaintiff's Complaint calls for a legal conclusion to
5 which no answer is required, and to the extent it is, this answering Defendant Randstad denies
6 the same.

7 32. Answering mislabeled Paragraph 29 of Plaintiff's Complaint, this answering
8 Defendant Randstad is without sufficient information upon which to base a belief as to whether
9 the retention of Black & LoBello's services were necessary, and upon said ground denies the
10 same, and every other assertion set forth therein.

11 **THIRD CLAIM FOR RELIEF**

12 **(Fraud)**

13 **(Frontiera and Randstad)**

14 33. Answering mislabeled Paragraph 30 of Plaintiff's Complaint, this answering
15 Defendant Randstad repeats and re-alleges his answers as set forth in Paragraphs 1 through 32
16 above with the same force and effect as though fully set forth herein.

17 34. Answering mislabeled Paragraph 31 of Plaintiff's Complaint, this answering
18 Defendant Randstad denies the allegations contained therein, and avers that on or around June
19 17, 2013, Frontiera was hired by CK through the use of Randstad's services to serve as
20 Controller on a temporary basis, and further avers that it performed the contracted services
21 described in the Agreement.

22 35. Answering mislabeled Paragraph 32 of Plaintiff's Complaint, this answering
23 Defendant Randstad denies the allegations contained therein, except admits that it conducted
24 reference checks on Frontiera as referenced in the Agreement.

25 36. Answering mislabeled Paragraph 33 of Plaintiff's Complaint, this answering
26 Defendant Randstad is without sufficient information upon which to base a belief as to the truth
27 or falsity of the allegations contained therein and upon said ground denies the same.

28 DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

1 37. Answering mislabeled Paragraph 34 of Plaintiff's Complaint, this answering
2 Defendant Randstad is without sufficient information upon which to base a belief as to the truth
3 or falsity of the allegations contained therein and upon said ground denies the same.

4 38. Answering mislabeled Paragraph 35 of Plaintiff's Complaint, this answering
5 Defendant Randstad denies the allegations contained therein.

6 39. Answering mislabeled Paragraph 36 of Plaintiff's Complaint, this answering
7 Defendant Randstad is without sufficient information upon which to base a belief as to the truth
8 or falsity of the allegations contained therein and upon said ground denies the same.

9 40. Answering mislabeled Paragraph 37 of Plaintiff's Complaint, this answering
10 Defendant Randstad is without sufficient information upon which to base a belief as to the truth
11 or falsity of the allegations contained therein and upon said ground denies the same.

12 41. Mislabeled Paragraph 38 of Plaintiff's Complaint calls for a legal conclusion to
13 which no answer is required, and to the extent it is, this answering Defendant Randstad denies
14 the same.

15 42. Mislabeled Paragraph 39 of Plaintiff's Complaint calls for a legal conclusion to
16 which no answer is required, and to the extent it is, this answering Defendant Randstad denies
17 the same.

18 43. Answering mislabeled Paragraph 40 of Plaintiff's Complaint, this answering
19 Defendant Randstad is without sufficient information upon which to base a belief as to whether
20 the retention of Black & LoBello's services were necessary, and upon said ground denies the
21 same, and every other assertion set forth therein.

22 **FOURTH CLAIM FOR RELIEF**

23 **(Negligent Misrepresentation)**

24 **(Randstad)**

25 44. Answering mislabeled Paragraph 41 of Plaintiff's Complaint, this answering
26 Defendant Randstad repeats and re-alleges his answers as set forth in Paragraphs 1 through 43
27 above with the same force and effect as though fully set forth herein.

28 DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
 AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

1 45. Mislabeled Paragraph 42 of Plaintiff's Complaint calls for a legal conclusion to
2 which no answer is required, and to the extent that it is, this answering Defendant Randstad
3 denies the same.

4 46. Answering mislabeled Paragraph 43 of Plaintiff's Complaint, this answering
5 Defendant Randstad is without sufficient information upon which to base a belief as to the truth
6 or falsity of the allegations contained therein and upon said ground denies the same.

7 47. Mislabeled Paragraph 44 of Plaintiff's Complaint calls for a legal conclusion to
8 which no answer is required, and to the extent it is, this answering Defendant Randstad denies
9 the same.

10 48. Answering mislabeled Paragraph 45 of Plaintiff's Complaint, this answering
11 Defendant Randstad is without sufficient information upon which to base a belief as to whether
12 the retention of Black & LoBello's services were necessary, and upon said ground denies the
13 same, and every other assertion set forth therein.

14 **FIFTH CLAIM FOR RELIEF**

15 **(Unjust Enrichment)**

16 **(Frontiera and Randstad)**

17 49. Answering mislabeled Paragraph 46 of Plaintiff's Complaint, this answering
18 Defendant Randstad repeats and re-alleges his answers as set forth in Paragraphs 1 through 48
19 above with the same force and effect as though fully set forth herein.

20 50. Answering mislabeled Paragraph 47 of Plaintiff's Complaint, this answering
21 Defendant Randstad denies the allegations contained therein.

22 51. Answering mislabeled Paragraph 48 of Plaintiff's Complaint, this answering
23 Defendant Randstad is without sufficient information upon which to base a belief as to the truth
24 or falsity of the allegations contained therein and upon said ground denies the same.

25 52. Mislabeled Paragraph 49 of Plaintiff's Complaint calls for a legal conclusion to
26 which no answer is required, and to the extent it is, this answering Defendant Randstad denies
27 the same.

28 DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
 AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

1 53. Mislabeled Paragraph 50 of Plaintiff's Complaint calls for a legal conclusion to
2 which no answer is required, and to the extent it is, this answering Defendant Randstad denies
3 the same.

4 54. Answering mislabeled Paragraph 51 of Plaintiff's Complaint, this answering
5 Defendant Randstad is without sufficient information upon which to base a belief as to whether
6 the retention of Black & LoBello's services were necessary, and upon said ground denies the
7 same, and every other assertion set forth therein.

8 **SIXTH CLAIM FOR RELIEF**

9 **(Conversion/Constructive Trust)**

10 **(Frontiera)**

11 55. Answering mislabeled Paragraph 52 of Plaintiff's Complaint, this answering
12 Defendant Randstad repeats and re-alleges his answers as set forth in Paragraphs 1 through 54
13 above with the same force and effect as though fully set forth herein.

14 56. Answering mislabeled Paragraph 53 of Plaintiff's Complaint, this answering
15 Defendant Randstad is without sufficient information upon which to base a belief as to the truth
16 or falsity of the allegations contained therein and upon said ground denies the same.

17 57. Answering mislabeled Paragraph 54 of Plaintiff's Complaint, this answering
18 Defendant Randstad is without sufficient information upon which to base a belief as to the truth
19 or falsity of the allegations contained therein and upon said ground denies the same.

20 58. Mislabeled Paragraph 55 of Plaintiff's Complaint calls for a legal conclusion to
21 which no answer is required, and to the extent it is, this answering Defendant Randstad denies
22 the same.

23 59. Answering mislabeled Paragraph 56 of Plaintiff's Complaint, this answering
24 Defendant Randstad is without sufficient information upon which to base a belief as to whether
25 the retention of Black & LoBello's services were necessary, and upon said ground denies the
26 same, and every other assertion set forth therein.

27
28 DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
 AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

SEVENTH CLAIM FOR RELIEF

(Embezzlement - Civil Theft)

(Frontiera)

60. Answering mislabeled Paragraph 57 of Plaintiff's Complaint, this answering Defendant Randstad repeats and re-alleges his answers as set forth in Paragraphs 1 through 59 above with the same force and effect as though fully set forth herein.

61. Answering mislabeled Paragraph 58 of Plaintiff's Complaint, this answering Defendant Randstad is without sufficient information upon which to base a belief as to the truth or falsity of the allegations contained therein and upon said ground denies the same.

62. Answering mislabeled Paragraph 59 of Plaintiff's Complaint, this answering Defendant Randstad is without sufficient information upon which to base a belief as to the truth or falsity of the allegations contained therein and upon said ground denies the same.

63. Mislabeled Paragraph 60 of Plaintiff's Complaint calls for a legal conclusion to which no answer is required, and to the extent it is, this answering Defendant Randstad denies the same.

64. Mislabeled Paragraph 61 of Plaintiff's Complaint calls for a legal conclusion to which no answer is required, and to the extent it is, this answering Defendant Randstad denies the same.

65. Answering mislabeled Paragraph 62 of Plaintiff's Complaint, this answering Defendant Randstad is without sufficient information upon which to base a belief as to whether the retention of Black & LoBello's services were necessary, and upon said ground denies the same, and every other assertion set forth therein.

EIGHTH CLAIM FOR RELIEF

(Negligent Supervision)

(Randstad)

66. Answering mislabeled Paragraph 63 of Plaintiff's Complaint, this answering Defendant Randstad repeats and re-alleges his answers as set forth in Paragraphs 1 through 65
DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

1 above with the same force and effect as though fully set forth herein.

2 67. Answering mislabeled Paragraph 64 of Plaintiff's Complaint, this answering
3 Defendant Randstad denies the allegations contained therein.

4 68. Answering mislabeled Paragraph 65 of Plaintiff's Complaint, this answering
5 Defendant Randstad denies the allegations contained therein, and avers that it performed the
6 contracted services described in the Agreement.

7 69. Mislabeled Paragraph 66 of Plaintiff's Complaint calls for a legal conclusion to
8 which no answer is required, and to the extent it is, this answering Defendant Randstad denies
9 the same.

10 70. Answering mislabeled Paragraph 67 of Plaintiff's Complaint, this answering
11 Defendant Randstad is without sufficient information upon which to base a belief as to whether
12 the retention of Black & LoBello's services were necessary, and upon said ground denies the
13 same, and every other assertion set forth therein.

14 71. Mislabeled Paragraph 68 of Plaintiff's Complaint calls for a legal conclusion to
15 which no answer is required, and to the extent it is, this answering Defendant Randstad denies
16 the same.

17 **CONCLUDING ANSWER TO ALL ALLEGATIONS**

18 All allegations not specifically addressed above due to the nature of the language and
19 construction of the allegations, or for any other reason, are specifically denied.

20 **AFFIRMATIVE DEFENSES**

21 **FIRST:** Defendant alleges that the allegations contained in Plaintiff's
22 Complaint fail to state causes of action against Defendant upon which relief can be granted.

23 **SECOND:** Defendant alleges that Plaintiff's allegations are barred by the
24 doctrine of laches.

25 **THIRD:** Defendant alleges that Plaintiff's allegations are barred because
26 Plaintiff had knowingly and voluntarily assumed any risks at issue.

27 **FOURTH:** It has been necessary for Defendant Randstad to employ the
28 DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

1 services of Bauman Loewe Witt & Maxwell, PLLC. and Seyfarth Shaw LLP to defend this
2 action, and a reasonable sum should be allowed Defendant as and for attorney's fees, together
3 with costs expended in this action.

4 FIFTH: Defendant alleges that the incidents alleged in the Complaint, and
5 the alleged damages, if any, to Plaintiff were proximately caused or contributed to by Plaintiff's
6 own negligence and such negligence was greater than any of the Defendant's negligence.

7 SIXTH: Defendant alleges that Plaintiff did not exercise ordinary care,
8 caution, or prudence over the direction, supervision or control of Defendant Frontiera to avoid
9 the alleged harm it suffered, and the alleged harm, if any, complained of was directly and
10 proximately contributed to and caused by fault, carelessness, and negligence of Plaintiff.

11 SEVENTH: Defendant alleges that Plaintiff has failed, in whole or in part, to
12 mitigate its alleged damages.

13 EIGHTH: Pursuant to NRCP 11, as amended, all possible affirmative
14 defenses may not have been alleged herein insofar as sufficient facts were not available after
15 reasonable inquiry upon the filing of Defendant's Answer, and therefore, this answering
16 Defendant reserves the right to amend its Answer to allege additional Affirmative Defenses if
17 subsequent investigation so warrants.

18 NINTH: Defendant alleges that Plaintiff breached its Agreement with
19 Defendant, and that breach is the cause of the alleged harm to the Plaintiff.

20 TENTH: Defendant alleges that the alleged acts of Frontiera are an
21 intervening and superseding cause of any alleged harm to the Plaintiff.

22 ELEVENTH: Defendant alleges that at diverse dates and times, Frontiera was an
23 employee of CK, and Randstad cannot be held liable for CK's or Frontiera's acts, omissions,
24 negligence or intentional acts.

25 WHEREFORE, this answering Defendant Randstad hereby pray for judgment as follows:

- 26 1. That Plaintiff takes nothing by reason of the Complaint on file herein;

27
28 DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

2. That this answering Defendant be awarded reasonable attorney's fees and costs for the defense of this matter;

3. For such other and further relief as the Court deems just and proper.

DATED this 19th day of May 2016.

BAUMAN LOEWE WITT & MAXWELL, PLLC

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ERIC R. MCDONOUGH, ESQ.
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Attorneys for Defendant/Cross-Claimant
Randstad Professionals US, LP

DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

**DEFENDANT RANDSTAD'S CROSS-CLAIMS AGAINST
CROSS-DEFENDANT FRONTIERA**

COMES NOW, Cross-Claimaint, Randstad Professionals US, LP ("Defendant" or "Randstad") a Delaware limited partnership, by and through its attorneys of record, Michael C. Mills, Esq. of Bauman Loewe Witt & Maxwell, PLLC, and Eric R. McDonough, Esq. (pro hac vice pending) and Amy A. Abeloff, Esq. (pro hac vice accepted) of Seyfarth Shaw LLP, and hereby files these Cross-Claims against the above-named Cross-Defendant, and alleges as follows:

CROSS-CLAIM AGAINST FRONTIERA

1. Cross-Defendant Joseph Frontiera at the time of the issues in question herein, resided in the State of Nevada.

2. It has become necessary for Cross-Claimant Randstad ("Randstad") to retain the services of an attorney to prosecute this Cross-Claim and, therefore, Randstad should be awarded attorney's fees and costs of suit that are incurred as a result of this litigation.

CONTRIBUTION & INDEMNITY

3. Randstad alleges that in the event it is found to be liable to Plaintiff Count's Kustom's, LLC ("CK") or to any other party for any damages, or if payment is made by Randstad to CK or any other party as a result of the incidents or occurrences described in CK's Complaint, then Randstad's liability or payments is based upon the acts and/or omissions, including, without limitation, alleged negligence, breach of warranties (express and/or implied), breach of contract, and breach of fiduciary duties, of CK and/or Frontiera, and therefore Randstad is entitled to contribution and indemnity to the fullest extent permitted by law from Frontiera.

4. That is has become necessary for Randstad to retain the services of an attorney to prosecute this Cross-Claim and, therefore, said Randstad should be awarded attorney's fees and costs of suit that are incurred as a result of this litigation.

DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

WHEREFORE, Cross-Claimant Randstad, prays as follows:

1. For judgment against Cross-Defendant Frontiera in amounts to be determined at the time of trial;
2. For costs, disbursements and attorneys' fees; and
3. For such other and further relief as the Court deems just and proper.

DATED this 19th day of May 2016.

BAUMAN LOEWE WITT & MAXWELL, PLLC

MICHAEL C. MILLS, ESQ.

Nevada Bar No. 003534

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Attorneys for Defendant/Plaintiff-in-

Counterclaim/Cross-Claimant

Randstad Professionals US, LP

//

DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2 of the Eighth Judicial District Court, I hereby certify that I am an employee of BAUMAN LOEWE WITT & MAXWELL, PLLC, and that on the 19th day of May 2016, I caused a true and correct copy of the foregoing document **DEFENDANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER TO PLAINTIFF'S COMPLAINT AND CROSS-CLAIMS AGAINST DEFENDANT JOSEPH FRONTIERA** to be served as follows:

- ☐ VIA U.S. POSTAL MAIL: by placing a true and correct copy thereof enclosed in a sealed envelope with the postage thereon fully prepaid, addressed as indicated on the attached service list in the United States Mail.
- ☐ VIA FACSIMILE: by causing a true and correct copy thereof to be faxed on this date to the addressee(s) at the attached facsimile numbers set forth in the service list.
- ☐ VIA E-SERVICE: by causing a true and correct copy thereof to be electronically served in compliance with the Administrative Order 14-2 and Nevada Electronic Filing and Conversion Rules.

SERVICE LIST

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Attorney for Plaintiff,
Count's Kustoms, LLC

An Employee of BAUMAN LOEWE WITT &
MAXWELL, PLLC

DEFENDANT/CROSS-CLAIMANT RANDSTAD PROFESSIONALS US, LP's FIRST AMENDED ANSWER
AND CROSS-CLAIMS AGAINST CROSS-DEFENDANT JOSEPH FRONTIERA

EXHIBIT “C”

EXHIBIT “C”

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Attorney for Defendant/Counterclaimant/Cross-Claimant,
Randstad Professionals US, LP

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

COUNT'S KUSTOMS, LLC, a Nevada
corporation,

Plaintiff,

vs.

JOSEPH FRONTIERA, an individual;
RANDSTAD PROFESSIONALS; US, LP a
Delaware limited partnership, d/b/a
RANDSTAD PROFESSIONALS; DOES I
through X, and DOE CORPORATIONS XI
through XX, inclusive,

Defendants.

RANDSTAD PROFESSIONALS US, LP,

Plaintiff-in-Counterclaim,

COUNT'S KUSTOMS, LLC,

Defendant-in-Counterclaim.

RANDSTAD PROFESSIONALS US, LP,

Cross-Claimant.

CASE NO: 2:126-CV-00910-JAD-GWF

**[PROPOSED] ORDER GRANTING
DEFENDANT/
COUNTERCLAIMANT'S MOTION
FOR LEAVE TO AMEND ANSWER
AND COUNTERCLAIMS**

[PROPOSED] ORDER GRANTING DEFENDANT/COUNTERCLAIMANT'S MOTION FOR LEAVE TO
AMEND ANSWER AND COUNTERCLAIMS

1 JOSEPH FRONTIERA,

2 Cross-Defendant.

3
4 **[PROPOSED] ORDER GRANTING DEFENDANT/COUNTERCLAIMANT'S MOTION**
5 **FOR LEAVE TO AMEND ANSWER AND COUNTERCLAIMS**

6 Having considered Defendant/Counterclaimant, Randstad Professionals US, LP
7 ("Randstad")'s brief in Opposition to Plaintiff/Counterdefendant Count's Kustoms, LLC's
8 ("CK") Motion to Strike or in the Alternative, Motion to Dismiss, upon which the instant Motion
9 was alternatively brought, IT IS HEREBY ORDERED:

10 1. Randstad is granted leave to file a First Amended Answer and Counterclaims in the
11 form attached as Exhibit A to this Order.

12 2. The First Amended Answer and Counterclaims is deemed served and filed as of the
13 date of entry of this Order.

14 **IT IS SO ORDERED.**

15 Dated: _____, 2016

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17 By: _____
18 The Hon. Jennifer A. Dorsey
19 Presiding District Court Judge
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28 **[PROPOSED] ORDER GRANTING DEFENDANT/COUNTERCLAIMANT'S MOTION FOR LEAVE TO**
AMEND ANSWER AND COUNTERCLAIMS

EXHIBIT “D”

EXHIBIT “D”

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1 10. The owner of the Finance Company asked if I (on behalf of Randstad) had
2 completed a background check on Frontiera.

3 11. I told the owner that because she would be hiring Frontiera as a direct hire, it is
4 common industry practice for the company hiring the employee to perform the background
5 check. I indicated that running a background check on a candidate is ultimately the client's
6 choice and responsibility because as part of Randstad's vetting, Randstad does not conduct
7 criminal background or other checks aside from employment reference checking for its own
8 purposes.

9 12. The owner of the Finance Company hired Frontiera as a full-time employee.

10 13. Frontiera was with the Finance Company for approximately a year and a half
11 when the opportunity at Count's Kustoms ("CK") materialized.

12 14. Based on my previous experience placing Frontiera and the positive evaluations I
13 received about Frontiera's performance from other Randstad's clients, I presented Frontiera for
14 the CK opportunity.

15 15. I learned of the CK opportunity through Theo Spyer ("Spyer"), who is the
16 General Manager at a business affiliated with CK.

17 16. Spyer was engaged as a consultant by a third-party television network to hire
18 several consultants to work at CK for a year's time.

19 17. Spyer contacted me, gave me an idea of the type of candidates he sought, and an
20 estimated budget to hire the new consultants.

21 18. Spyer interviewed Frontiera, took him and me to lunch, and decided to hire
22 Frontiera on a consulting basis at CK thereafter.

23 19. After the interview process was complete, Spyer asked me if CK should run a
24 background check on Frontiera.

25 20. I told Spyer that it was CK's decision whether it wanted to run a background

26 DECLARATION OF SCOTT KAPLAN IN SUPPORT OF DEFENDANT/COUNTERCLAIMANT
27 RANDSTAD PROFESSIONALS US, LP's OPPOSITION TO PLAINTIFF/COUNTERDEFENDANT COUNT'S
28 KUSTOMS, LLC'S MOTION TO STRIKE COUNTERCLAIM OR IN THE ALTERNATIVE, MOTION TO
 DISMISS, OR IN THE ALTERNATIVE, MOTION TO AMEND ANSWER


1 check on Frontiera. I made clear that Randstad had not run any background checks on Frontiera,
2 but that a previous client had hired him as a permanent employee after I had suggested the client
3 should perform a background check before hiring Frontiera directly.

4 21. I further told Spyer I was not certain the previous client conducted a background
5 check on Frontiera, but based on the previous client's hiring of Frontiera in a more permanent
6 role, I believed perhaps that the client did conduct a background check.

7 22. Spyer hired Frontiera as a temporary consultant at CK.

8 I declare under penalty of perjury under the laws of the State of Nevada that the
9 foregoing is true and correct.

10 Executed this 18th day of May, 2016 at Las Vegas, Nevada.

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13 Scott Kaplan
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26 DECLARATION OF SCOTT KAPLAN IN SUPPORT OF DEFENDANT/COUNTERCLAIMANT
27 RANDSTAD PROFESSIONALS US, LP's OPPOSITION TO PLAINTIFF/COUNTERDEFENDANT COUNT'S
28 KUSTOMS, LLC'S MOTION TO STRIKE COUNTERCLAIM OR IN THE ALTERNATIVE, MOTION TO
DISMISS, OR IN THE ALTERNATIVE, MOTION TO AMEND ANSWER

EXHIBIT "E"

EXHIBIT "E"

DECLARATION OF THEO SPYER

I, Theo Spyer, declare as follows:

1. I have personal knowledge of the following facts stated in this declaration, except as to those matters which I state on information and belief, and as to those matters, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the facts stated herein.

2. I make this declaration in support of Defendant/Counterclaimant Randstad Professionals US, LP's ("Randstad") Opposition to Plaintiff/Counterdefendant Count's Kustoms, LLC's Motion to Strike or in the Alternative, Motion to Dismiss, or in the Alternative, Motion for Leave to Amend Answer.

3. On or around June 2013, I was recruited by a third-party to act as its consultant in hiring employee consultants for Count's Kustoms, LLC ("CK").

4. CK is located in Las Vegas, Nevada.

5. As part of this responsibility, I contacted Scott Kaplan ("Kaplan") at Randstad, with whom I have worked in the past.

6. I told Kaplan about the type of consultants CK sought, and Kaplan suggested Joseph Frontiera ("Frontiera") for the role.

7. Kaplan told me that Frontiera's previous employer loved him and that they were crushed when Frontiera resigned.

8. I understood that if CK was not satisfied with Frontiera's work after 90 days, however, that CK could request a replacement candidate from Randstad without paying any additional fees.

9. I hired Frontiera on behalf of CK and acted as his supervisor, until Frontiera proved himself to be capable and self-sufficient in carrying out his duties.

10. As Frontiera's supervisor, I reviewed his time sheets and approved his hours. I

DECLARATION OF THEO SPYER IN SUPPORT OF DEFENDANT/COUNTERCLAIMANT
RANDSTAD PROFESSIONALS US, LP'S OPPOSITION TO PLAINTIFF/COUNTERDEFENDANT COUNT'S
KUSTOMS, LLC'S MOTION TO STRIKE COUNTERCLAIM OR IN THE ALTERNATIVE, MOTION TO
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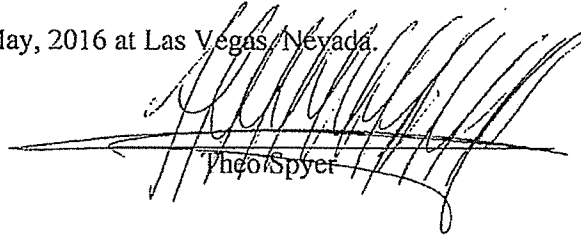
1 signed these time sheets and sent them to Randstad on a weekly basis. My signature appears on
2 the Randstad Finance & Accounting Service Agreement, which is attached hereto.

3 11. Frontiera was hired to provide usual and ordinary accounting functions for CK.
4 During the period I supervised Frontiera, there were no indications of any mismanagement of
5 CK's cash or assets.

6 I declare under penalty of perjury under the laws of the State of Nevada that the
7 foregoing is true and correct.

8 Executed this 18th day of May, 2016 at Las Vegas, Nevada.

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Theo Spyer

DECLARATION OF THEO SPYER IN SUPPORT OF DEFENDANT/COUNTERCLAIMANT
RANDSTAD PROFESSIONALS US, LP's OPPOSITION TO PLAINTIFF/COUNTERDEFENDANT COUNT'S
KUSTOMS, LLC'S MOTION TO STRIKE COUNTERCLAIM OR IN THE ALTERNATIVE, MOTION TO
DISMISS, OR IN THE ALTERNATIVE, MOTION TO AMEND ANSWER